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Issue Date: 03 October 2003

CASE NO. 2002-LHC-1993

OWCP NO. 08-118892

IN THE MATTER OF:

GARY D. PHILLIPS, JR.

Claimant

v.

TIMCO, INC.

Employer

and

EAGLE PACIFIC INSURANCE COMPANY

Carrier

APPEARANCES:

JOHN D. MCELROY, ESQ.

For The Claimant

CHRIS A. LORENZEN, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Gary D. Phillips, Jr. (Claimant) against Timco, Inc. (Employer) and Eagle Pacific Insurance

Company (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on February 6, 2003, in Beaumont, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 23 exhibits, Employer/Carrier proffered 59 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer/Carrier on May 9, 2003 and April 17, 2003, respectively. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Act applies to this matter.

2. That the Claimant was injured on October 25, 1999.

3. That Claimant's injury occurred during the course and scope of his employment with Employer.

4. That the Employer was notified of the accident/injury on October 26, 1999.

5. That Employer/Carrier filed Notices of Controversion on November 3, 2000, April 6, 2001 and June 18, 2001.

6. That an informal conference before the District Director was held on March 1, 2001.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr._____; Claimant's Exhibits: CX-_____; Employer/Carrier Exhibits: EX-__; and Joint Exhibit: JX-__.

7. That Claimant received a total of $2,153.63 in temporary total disability benefits from November 15, 1999 through December 5, 1999 and from March 1, 2001 through June 20, 2001. (EX-59)

8. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act. Id.

II. ISSUES

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's disability.

2. Whether Claimant has reached maximum medical improvement.

3. Claimant's average weekly wage.

4. Reasonableness of recommended surgery.

5. Entitlement to and authorization for medical care and services.

6. Employer/Carrier's entitlement to a credit for the overpayment of compensation.

7. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was born on September 27, 1967, and was thirty-five years old at the time of the hearing. He has an eighth-grade education but received a G.E.D. and briefly attended a technical school. He has no specialized vocational certificates. His driver's license has been suspended since the occurrence of an automobile accident in which he was involved but uninsured. Until he compensates an insurance company $4,000.00 for its uninsured motorist payment to the driver of the other automobile, his license will remain suspended. (Tr. 14-18, 97-98).

Claimant's employment experience has been limited to

construction work, pipefitting and boilermaking. He has four children and a spouse who works night shifts. If Claimant would accept employment during night shifts when his spouse works, child care would be a problem. (Tr. 14-18).

Claimant was employed by Employer as a fitter-welder assisting electricians to perform marine electrical work.[2] His job required frequent climbing, lifting, bending and stooping. Claimant was also required to regularly lift five pounds or more and occasionally lift as much as fifty pounds. He worked five days per week for Employer, but occasionally worked on Fridays or Saturdays for overtime pay. He earned between $14.00 and $15.00 per hour. (Tr. 19-22).

On October 25, 1999, Claimant tripped on welding leads and electrical cords in an access "hole" and fell to the ground. He felt a "sharp pain in my lower back" and reported the injury to his foreman on duty before completing his shift. (Tr. 22-24; EX-69).

On October 26, 1999, Claimant returned to work with pain in his middle and lower back. He reported his injury to a safety person who directed him to complete a written report. Claimant was placed on light-duty occupational status at a shop within Employer's facility. His light-duty job consisted of "standing around in the shop" and helping others take measurements. Continuous standing in the light-duty job increased Claimant's back pain. He reported the increased pain to the safety office, which provided him with heating pads. (Tr. 25-26).

At some point around November 4, 1999, after he was released to return to regular work in the yard, Claimant's sharp back pain returned when he was cutting metal using a port-o-band saw, a fifteen to twenty pound tool approximately two feet long and eight inches wide. He reported the pain to Employer's safety personnel who referred him to Employer's physician, Dr. Lance Craig. Dr. Craig provided an injection, ordered X-rays and diagnosed a pulled muscle. He restricted Claimant to light-duty for approximately one or two weeks. Claimant did not recall Dr. Craig releasing him to full-time work at regular duty. (Tr. 27-28).

Claimant testified he was provided a light duty job within Employer's facility following the November 4, 1999 aggravation

[2] According to Employer's personnel file, Claimant was hired on October 13, 1999. (EX-51, pp. 5, 10).

of his October 25, 1999 job injury. Claimant received his same pay rate at the light duty job. He remained on the light duty job until he was restricted from work by his family physician, Dr. Villegas. (Tr. 58-60).

Claimant treated with Dr. Villegas, who prescribed muscle relaxants, other medications and approximately three weeks of physical therapy. Dr. Villegas restricted Claimant from work during physical therapy. Claimant received no compensation benefits while he underwent physical therapy; however, he received a check for compensation benefits after he terminated physical therapy. The check was paid for the weeks Claimant was restricted from working by Dr. Villegas. (Tr. 28-30).

Claimant was laid-off by Employer while he was undergoing physical therapy which was improving his back complaints.[3] He requested a return to work slip, which was provided by Dr. Villegas, and sought employment with other employers in the "shipyard industry." He was "able to pretty much do my duties," but noted there was "some aggravation to it." He used muscle relaxants, performed physical exercises and used a heating pad to treat his ongoing symptoms of back pain. (Tr. 28-31, 33)

Despite his back pain following his return to work, Claimant did not continue treating with Dr. Villegas. Claimant was under the impression he was responsible for medical payments which he could not afford. He did not seek information about payment of medical benefits because he was no longer employed by Employer. (Tr. 31).

Claimant experienced middle and low back pain which radiated into his right leg to the knee. His pain was made worse by bending, stooping and lifting. Occasionally, Claimant's back would go "completely out," which forced him to remain in bed for two to three days. Although he could lift from fifty to seventy-five pounds before his injury, he restricted himself from lifting more than twenty-five pounds post-injury. (Tr. 32-34).

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[3] Claimant underwent physical therapy from November 22, 1999, through December 8, 1999. (CX-8, p. 9). On November 24, 1999, he was laid-off by Employer, which contacted him via a November 29, 1999 telephone call by one of Employer's employees. (EX-51, p. 9). Claimant voluntarily quit returning for physical therapy on December 3, 1999. On December 8, 1999, Claimant reported to the physical therapy provider that he was released back to work and would not return. (CX-9, p. 8).

Claimant sought chiropractic treatment with Dr. Denman for his ongoing back problems during "the following summer after the accident." Dr. Denman reviewed Claimant's X-rays which were provided during Claimant's original treatment with Dr. Craig. Dr. Denman provided more physical therapy and performed spinal manipulations. Id.

Claimant was referred to Dr. Beck by Carrier, with whom he requested specialized treatment for his back complaints. He then treated regularly with Dr. Ghadialli per a friend's recommendation. Dr. Ghadialli physically examined Claimant and ordered diagnostic testing that revealed two or three herniated discs. Dr. Ghadialli recommended that Claimant should not return to construction work and restricted Claimant from lifting more than twenty pounds and bending and stooping. Dr. Ghadialli recommended surgery, which Claimant desired to undergo; however, authorization for surgery has been denied. (Tr. 34-36, 38). Claimant exceeded Dr. Ghadialli's restrictions at times on his post-injury jobs. (Tr. 46-47).

Claimant was physically evaluated by Dr. Weiner at Carrier's request. Claimant estimated the evaluation lasted ten to fifteen minutes. Dr. Weiner concluded Claimant was unable to return to work; however, he opined surgery was unnecessary. (Tr. 37-38).

After October 1999, Claimant sustained several accidents which required medical treatment. He treated at an emergency room after experiencing a "sharp pain in my back" while moving furniture. The pain was "the same kind of back problem" Claimant experienced from his job injury. (Tr. 39-40). On June 27, 2000, when Claimant treated at an emergency room for the back injury, he indicated he was a pipefitter and that he desired to return to his job, requesting a release to return to work. Upon examination by the emergency room physician, Dr. Watson, Claimant was provided his release to return to work. (Tr. 67-68).

Claimant also sustained injuries in multiple car accidents. He treated at the emergency room for neck and shoulder stiffness following his first car accident, which was not problematic for Claimant. His second car accident involved a greater impact and "aggravated my back a little more." (Tr. 40).

Specifically, on November 30, 2000, Claimant sustained an injury to his back in an automobile accident en route to undergo

an MRI of his back.[4] He explained the symptoms he experienced were a temporary exacerbation of his back pain "like I usually always get." Claimant was released to return to work following X-ray examination at the emergency room. He admitted his emergency room treatment was due to the symptoms he suffered as a result of his car accident. (Tr. 69-70).

On July 24, 2001, Claimant sustained a third automobile accident while returning from an evaluation with Dr. Hanson, an independent medical examiner designated by DOL in this matter.[5] He treated at the emergency room on July 25, 2001 complaining of low back pain related to the July 24, 2001 car wreck. He reported using only herbal products as medication. X-rays of Claimant's neck and back were taken, and Claimant was instructed to remain off work for two days, after which Claimant could return to work. (Tr. 71-72).

On March 10, 2002, Claimant sustained a fourth automobile accident. He treated at the emergency room, where he did not report complaints of back pain. (Tr. 73-74; EX-3, pp. 101-110).

Claimant currently experiences sharp, burning and stinging pain in his middle low back which radiates down his left leg. The pain is aggravated by bending, stooping, and lifting more than twenty pounds. It is also aggravated by continuous walking or exercise and driving or sitting for more than thirty minutes. The pain in his leg is "pretty much constant every day," while the pain in his back "comes and goes." Consequently, Claimant estimates he must lay down to rest at least once or twice per day for up to an hour and a half. (Tr. 41-44, 46-47).

Claimant was terminated by one employer, Becon, because of his inability to return to work due to the pain, which he relates to his October 1999 job injury with Employer. (Tr. 44-

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[4] Claimant underwent a lumbar MRI on November 30, 2000, at the North Houston Imaging Center at the referral of Dr. Denman. (EX-12, p. 1). This was apparently Claimant's second post-injury car accident. Previously, on April 7, 2000, he was involved in a car accident in which he rear-ended the vehicle in front of him. After exchanging information, the drivers of the automobiles left the scene. They returned later to complete an accident report and seek hospital treatment. (EX-57).

[5] Dr. Hanson reported his initial office visit with Claimant occurred on July 24, 2001. (EX-11, p. 26).

45). Claimant takes muscle relaxants and pain relievers including Zanaflex and Vicodan three times daily. The medicines cause drowsiness which affects his ability to drive and work; however, he has worked while taking the medicine. (Tr. 44).

Claimant last worked around three to four months before the hearing. He has not "checked on too many jobs. There's not a lot going on right now in town." Other than his back, Claimant has no health problems which interfere with his return to work. He has no knowledge or experience in occupations other than general construction. (Tr. 47).

Claimant incorrectly completed numerous post-injury employment applications. On the applications, he reported sustaining only a pulled muscle which resolved. He was not reporting truthfully on the applications for fear he would not be hired if the prospective employer was aware of the severity of his injury. Likewise, he incorrectly reported having a driver's license; however, he noted construction jobs generally do not require applicants to drive. He did not always accurately report his criminal history on job applications, but would generally disclose his criminal history during personal interviews. (Tr. 48-50, 60-62).

On cross-examination, Claimant acknowledged the accuracy of his November 6, 2002 deposition testimony which indicated that the only time he missed work due to a back complaint since January 2000 occurred following his accident moving furniture when he was employed with Becon. Likewise, Claimant affirmed his deposition testimony that he has been denied no work due to a failure to pass a pre-employment physical. He admitted he failed to apply for work for several months prior to the hearing. (Tr. 51-54).

Claimant admitted he was incarcerated for six or seven months in 1997 due to driving with a suspended driver's license. Such an infraction was a violation of a probation sentence related to a 1985 burglary in which Claimant was involved. Claimant was previously incarcerated for thirteen months in 1989 or 1990 because of a probation violation related to the same 1985 conviction.[6] Claimant was released on parole following

[6] According to a February 19, 1990 judgment, Claimant was originally sentenced to three years of probation without entering an adjudication of guilt in a 1985 matter. In 1987, the court entered an adjudication of guilt and suspended the imposition of a ten-year incarceration in favor of a ten-year

thirteen months of incarceration during 1989 and 1990. Claimant's 1997 incarceration for six or seven months completed and discharged his sentence related to the 1985 burglary. (Tr. 55-58).

Before working with Employer, Claimant's employment was sporadic; however, when he found work, he generally worked five days per week. He earned $744.50 in 1997 and $9,761 in 1998. (Tr. 57-58). After working with Employer, Claimant's employment remained sporadic among various employers. (Tr. 61).

Claimant denied he was simply laid off by Employer because the construction job Employer was performing ended. He was provided a layoff slip with the last paycheck he received after missing three weeks of work due to physical therapy. Employer provided him no explanation for the layoff. (Tr. 59-60).

Claimant was never denied full-time work nor forced to work at a lower rate due to his job injury. He admitted earning $17.50 per hour as a pipefitter for A&B Builders in January 2000. He earned $17.00 per hour as a pipefitter for H.B. Zachry (Zachry) in January and February 2000. His employment with Zachry was terminated because Claimant reported he was relocating. Claimant returned to Zachry from March 29, 2000 until March 31, 2000. He decided to discontinue his employment with Zachry due to domestic problems with his wife. While he worked with Americon and Zachry, Claimant performed full-time work within those employers' expectations.[7] (Tr. 60-65).

Claimant earned $17.00 as a pipefitter for Becon from June 13, 2000 until July 25, 2000, when Claimant failed to return to the job because of the back injury he sustained while moving furniture. He also worked for A&B Builders for approximately ten hours on May 16, 2000, when he worked full-time as a pipefitter. (Tr. 65-66).

Claimant passed a September 6, 2000 physical examination

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period of probation which included orders to serve twelve months in a restitution center and to "support all dependents." On February 19, 1990, following a conviction of absconding from the restitution center on December 30, 1989, Claimant received an eight-year sentence of incarceration. (EX-72, pp. 23-27).

[7] There are no descriptions of the specific physical requirements or demands of Claimant's post-injury jobs with these employers.

related to his job application with Austin Industries. He recalled reporting to Austin Industries that he was not taking prescription medications. He was hired by Austin, but failed to return for work immediately after the September 2000 physical. He underwent another physical examination for Austin on December 7, 2000. He worked for Austin Industries for "about five days until that job was over." (Tr. 68, 70-71).

In August 2001, Claimant worked for Triple-S Corporation. Although he could not recall what his occupation was for that employer, Claimant recalled reporting his October 25, 1999 job injury with Employer and that he was released to return to full-time work. He worked with Gulf Pro from January 17 through February 3, 2002, when the job ended. Likewise, Claimant noted his employment with "Poly Star" ended when the job on which the employer was working ended. (TR. 72-73).

In April 2002, Claimant worked with various employers. He worked a night job with "Carbon Black." He worked for Meyer Group, which hired him despite his report of a prior back injury and Vicodin use. He was hired as a pipefitter for C.B.O. Industrial Maintenance in July 2002, despite his reports of filing a compensation claim related to the instant job injury and using Vicodin. Claimant last worked as a pipefitter earning $17.25 per hour for Carbon Black. (Tr. 74-76).

Claimant was never terminated by any post-injury employer because he was incapable of performing his job. He never reported physical limitations to any prospective post-injury employer. He drives despite a suspended driver's license and has never missed any work due to his suspended driver's license. (Tr. 77-78). He has not driven company cars in jobs he obtained following the suspension of his driver's license. (Tr. 98).

On re-direct examination, Claimant indicated his pre-employment physicals generally involved an eye exam and a urinalysis only. However, one or two of the exams involved limited range-of-motion examinations in which he was asked to squat. (Tr. 78-79).

On re-cross-examination, Claimant denied pre-employment physicals included thorough physical examinations of his back. Rather, he was occasionally asked to report a history of back injuries and complaints for which an evaluating physician might ask some follow-up questions. (Tr. 79-80).

William Quintanilla, M.ED, L.PC

Mr. Quintanilla is a licensed vocational rehabilitation counselor with 28 years of experience in vocational rehabilitation. He practices in Houston, Texas and provides vocational assessments in various matters including claims before DOL and OWCP. (Tr. 81-82; EX-52).

Mr. Quintanilla reviewed Claimant's medical and vocational records and personally interviewed Claimant on September 12, 2001. He prepared a vocational assessment on November 20, 2002 and a labor market survey on January 6, 2003. Additionally, Mr. Quintanilla was present at the hearing and listened to Claimant's live testimony. (Tr. 82-84, 93).

To prepare his January 6, 2003 labor market survey, Mr. Quintanilla considered positions within the medium exertional level, which requires lifting 25 pounds frequently and 50 pounds occasionally, as well as jobs within the light exertional level, which requires lifting 20 pounds occasionally and ten pounds frequently. He limited his search to jobs which would allow Claimant to alternate standing and walking. He found jobs through the Texas Work Force Commission and newspaper want-ads. (Tr. 83-84).

Mr. Quintanilla reported Claimant's available employment opportunities included the following "light" positions: (1) a newspaper carrier for the Houston Chronicle, which required applicants to fill newspaper vending machines around the city of Beaumont; (2) a cashier/stocker at the Family Dollar Store, which required applicants to work as a cashier and stock goods on shelves; (3) an assembly worker matching tags to garments for Alamo Cleaners, which required applicants to stand, although the standing requirement could be accommodated. Mr. Quintanilla's survey included two "medium" jobs: (1) a welder for Modern Manufacturing in Silsbee, Texas; and (5) maintenance worker at Longhorn Travel Plaza/Casino in Louisiana, where applicants would be required to perform stocking and custodial tasks. The welding position would be similar to Claimant's prior occupation as a pipefitter.[8] (Tr. 85-87).

[8] In his vocational assessment, Mr. Quintanilla reported general types of jobs which Claimant could perform, but did not discuss Claimant's physical limitations and restrictions. He noted Claimant had no valid driver's license and complained of pain in his lower back and left lower extremity. The following general jobs were identified: a gate guard, security guard,

Relying on Claimant's testimony, Mr. Quintanilla noted Claimant's post-injury employment history includes jobs as a pipefitter and as a welder-shipfitter. According to the Dictionary of Occupational Titles (DOT), a pipefitter job is considered to be "heavy," while a job as a welder-shipfitter is considered "medium." (Tr. 83-84). With the exception of the welding position, Mr. Quintanilla indicated all of the potential jobs he identified were lighter-duty jobs than Claimant's actual post-injury jobs. The jobs identified in Mr. Quintanilla's survey paid less than Claimant's prior employment. (Tr. 87-88).

On cross-examination, when asked to rely on the assumption that Claimant needs surgery, Mr. Quintanilla admitted Claimant's best occupational decision would be to remain in his present sporadic employment rather than seek more "stable" jobs identified in his labor market survey. Mr. Quintanilla was unaware whether Claimant was certified as a MIG welder. Mr. Quintanilla assumed Claimant possessed skills necessary to weld because of Claimant's "welding background."[9] Mr. Quintanilla noted Claimant's criminal background and history should not interfere with a position at the casino because Claimant would not be "placed in a situation where he's handling large amounts of money or anything like that." (Tr. 89-92).

Mr. Quintanilla testified the newspaper delivery job, which paid $800.00 monthly, did not require applicants to pay for fuel during delivery because "$800.00 per month is not very much money" and would be "a limited amount of money for what he'd have to do." In the past, the newspaper provided its own trucks for employees' use. Claimant would need a valid driver's license for the newspaper delivery job. (Tr. 92).

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deliverer/courier, cashier, order clerk and surveillance system monitor. (EX-50). In his labor market survey, Mr. Quintanilla did not discuss Claimant's physical restrictions and limitations, but noted Claimant complained of ongoing pain in his lower back and left lower extremity. (EX-61). Other than "light" or "medium" duty notations in the survey, the physical requirements and demands of the positions, namely bending, stooping, lifting, etc., were not reported. (EX-61, pp. 2-3).

[9] Claimant was called in rebuttal and testified he "tinkered" with MIG welders, but was never required to use such machines as part of any job. He has never been tested or certified as a MIG welder. (Tr. 96-97).

Mr. Quintanilla relied on the occupational classification of jobs to determine physical descriptions and requirements. For instance, he did not identify the particular physical demands and limitations of the cashier/stocker job at Family Dollar, but noted, "it's a light job, so therefore lifting shouldn't be more than 20 pounds." Likewise, Mr. Quintanilla explained his original November 20, 2002 vocational assessment identified entry-level jobs in the "light" to "sedentary" exertional level, but failed to identify the particular physical descriptions and requirements of the reported jobs. Mr. Quintanilla admitted Claimant's criminal history "could be a consideration." (Tr. 92-95).

The Medical Evidence

Howard Williams, M.D.

On November 1, 1993, Dr. Williams, whose credentials are not set forth in the record, treated Claimant for a back injury sustained on October 29, 1993, when a chain fell and injured Claimant's back. Claimant was restricted to modified duty until November 10, 1993, when he was released to regular duty. Dr. Williams treated Claimant for an injury Claimant sustained to his left leg on January 13, 1994. Claimant was released from medical treatment on January 18, 1994. (EX-7, pp. 1-8).

Tower Medical Center of Nederland

On November 8, 1999, Claimant treated with Dr. Lance A. Craig, whose credentials are not of record, for complaints of back pain. Claimant reported he injured his back after he tripped on cables while entering a manhole at work. Claimant reported he returned to full duty after he was initially treated at work. His back condition deteriorated until he sought further medical treatment at Tower Medical Center. Claimant reported he could not flex or extend his back without pain, most of which was "right over L5-L4 [sic], dead center and then a little bit is in the left paravertebral muscles." X-rays of the lumbosacral spine indicated a "straightening of the normal lordotic curve indicative of muscle spasm." Dr. Craig diagnosed a lumbar strain and prescribed Decadron and Aleve for pain. Dr. Craig reported Claimant was "fit for duty." (EX-9, pp. 24-26; CX-11, pp. 28-32).

On September 6 and 7, 2000, Claimant presented for a pre-employment evaluation for Austin Industrial. Claimant reported he was off work for a total of three weeks due to an October

1999 back strain. Physical examination revealed a normal spine. Likewise, on December 7, 2000, Claimant underwent another pre-employment physical for Austin Industries in which his spine was reported as "normal." (EX-9, pp. 27-53; CX-11, pp. 33-59).

Leopold Villegas, D.O.

On November 10, 1999, Dr. Villegas treated Claimant for complaints of back pain related to an injury sustained from tripping over cables at work. (CX-10, p. 1). Palpation revealed mild to moderate pain in the lower thoracic region and lumbosacral spine. Dr. Villegas diagnosed acute musculoskeletal strain of the lumbosacral spine and prescribed analgesics and muscle relaxants. He restricted Claimant from heavy lifting or excessive bending for five to seven days. Claimant was also restricted from pushing and pulling, climbing, stooping and squatting. (CX-10, p. 2; EX-8, p. 2).

On November 15, 1999, Dr. Villegas placed Claimant off-work pursuant to his diagnosis of acute musculoskeletal strain of the lumbosacral spine. On November 30, 1999, Claimant complained of pain radiating into his leg, but reported his back was better. Claimant denied paralysis or paresthesias. (CX-10, pp. 3-5; EX-8, p. 2).

On December 3, 1999, Claimant reported he was ready to return to work. He denied ongoing severe pain or frame paralysis. He was prescribed Xanax and was warned about drowsiness and alcohol use with the medication. He was released to return to work without restrictions. (CX-10, p. 5; EX-8, p. 3).

Claimant received refills for his Xanax prescription on January 3, 2000, February 8, 2000, March 6, 2000 and April 3, 2000. On June 27, 2000, Claimant returned for treatment following an injury sustained while lifting furniture. His medical record indicates he was diagnosed with acute musculoskeletal strain which resolved. Claimant was released to return to work. (CX-10, pp. 5-6; EX-8, pp. 3-4).

On August 28, 2000, Claimant returned for complaints of back pain, requesting treatment with a specialist. Claimant was diagnosed with chronic back pain and radiculopathy. Dr. Villegas referred Claimant to Dr. Beck for follow-up and prescribed Skelaxin for muscle spasm and pain. Claimant was restricted from heavy lifting, pulling and bending. He was directed to use heat treatment and seek treatment with an

emergency room upon complaints of paralysis. (CX-10, p. 6; EX-8, p. 4).

On November 10, 2000, Claimant returned, complaining of back pain. He requested a written statement indicating he was under the care of Dr. Villegas while he was off work. Claimant reported he was seeing Dr. Ghadially after he treated with Dr. Beck. Dr. Villegas diagnosed chronic lumbosacral pain and prescribed follow-up treatment with Drs. Beck and Ghadially. (CX-10, p. 7; EX-8, p. 5).

Physical Therapy Associates

From November 15, 1999 through December 8, 1999, Claimant underwent physical therapy with Physical Therapy Associates upon the referral of Dr. Villegas. Claimant initially reported constant and dull pain in his left lower back. He experienced a sharp, stinging pain radiating from his back through his left thigh. The pain worsened with prolonged sitting, standing, walking and coughing. Pain improved with laying down and using heating pads. (CX-8, pp. 9-11; EX-17; pp. 3-5).

On December 1 and 3, 1999, Claimant reported decreased pain with the performance of "McKenzie exercises." (CX-8, pp. 13-14; EX-17, pp. 7-8). Claimant voluntarily discontinued physical therapy after December 3, 1999. On December 8, 1999, Claimant reported he was "released back to work and is not to return." The final therapy report indicated Claimant's "established goals" included: (1) increased range of motion, including improved trunk mobility; (2) decreased pain; (3) improved functional mobility in his gait and work activities; and (4) return to work. (CX-8, p. 17; EX-17, p. 11).

M.Y.I. Beck, M.D.

On September 19, 2000, Dr. Beck, who was referred by Dr. Villegas, treated Claimant for complaints of low back pain with radiation to the left leg since his job injury. Claimant reported his pain had been ongoing for approximately nine months and that it was made worse by sitting, standing, moving, bending, lifting and coughing. The pain improved with rest, heat and massage. Physical examination was generally normal; however, Claimant was reported as obese. Dr. Beck diagnosed lumbar radiculopathy and prescribed exercises, weight reduction, antinflammatory medications and an MRI of the lumbar spine. (CX-9, pp. 11-17; EX-8, pp. 6-7; EX-10, pp. 5-11).

Accident and Injury Center

While he treated with Drs. Villegas and Beck, Claimant concurrently treated with Dr. William L. Denman, a chiropractor. On November 19, 1999, Claimant complained of back pain and stiffness that improved with medication. Claimant's pain reportedly worsened with sitting, repetitious movements and standing. Palpation revealed moderate pain and discomfort at L1-L5 bilaterally. X-rays revealed no evidence of fracture, dislocation or gross pathology. There was a mild decrease of the lordotic lumbar curve. Vertebral bodies were normal, but disc spaces were decreased at L4-L5 and L5-S1. Mild scoliosis was present. (EX-18, pp. 1-3).

Dr. Denman diagnosed lumbosacral sprain/strain, lumbar IVD syndrome without Myelopathy, deep and superficial myospasms and restriction of motion. Dr. Denman restricted Claimant from work. He prescribed heat, interferential, myofascial release and deep tissue massage. He recommended manipulation of Claimant's lumbar spine. Claimant was directed to return for treatment daily for one week and three times weekly for the following six to eight weeks. Dr. Denman's records indicate Claimant returned on November 22, 23, and 24, 1999, reporting some improvement only on November 23, 1999. Otherwise, Claimant reported no significant changes. (EX-18, pp. 3-7; CX-7, pp. 4-7).

Dr. Denman's records indicate Claimant returned for an office visit on April 17, 2002. Dr. Denman recommended a functional capacity evaluation and the determination of an impairment rating. (EX-19).

Downtown Plaza Imaging Center

On November 30, 2000, Dr. Denman ordered an MRI of Claimant's lumbar spine. The MRI, which was reported by Dr. John S. Lee, whose credentials are unknown, noted Claimant's excessively large size and obesity with "some motion and motion artifacts." The MRI findings and impression included: (1) posteriorly herniated and extruded disc, more left paracentral posterior herniation at L3-L4, impinging on the thecal sac; (2) large posteriorly herniated and extruded disc migrating inferiorly through a large, torn annulus with severe impingement upon the thecal sac causing significant stenosis at L4-L5; and (3) a very large herniated and extruded disc migrating through a large and massively torn annulus impinging upon the thecal sac and S1 nerve roots, more on the left, resulting in severe left

paracentral spinal and foraminal stenosis at L5-S1. (EX-12, pp. 1-2; EX-18, pp. 4-9).

On December 26, 2000, Claimant underwent radiological examination, a discogram, a steroid and Marcaine injection, a pain management consultation, and a post-lumbar CT scan with Dr. Lee at Dr. Denman's referral.[10] Claimant's lumbar spine X-ray revealed: (1) five non-rib bearing lumbar vertebral bodies with no fracture or listhesis; (2) very small rudimentary disc at S1-S2; (3) mild to moderate spondylosis with facetal arthropathias and osteophytosis from L3-S1 and 20-30% reduction of the disc height from LS-S1; (4) a calcified density in the posterior disc at L3-L4; and (5) calcification projecting into the spinal canal at L4-L5, consistent with a calcified herniated disc causing stenosis at L4-L5. (EX-12, pp. 22-32; EX-18, p. 13).

Claimant's discography report indicated Claimant underwent a discogram at L2-L3, L3-L4, L4-L5 and L5-S1. A normal discogram at L2-L3 was reported. Claimant did not complain of pain at L2-L3. An abnormal discogram at L3-L4 with leakage into sub-annular and epidural spaces through a torn annulus with moderate to severe concordant back pain and radiculopathies on the left was reported. At L4-L5, an abnormal discogram with sizeable leakage into the epidural space through a torn annulus, extending to the left side and associated with severe concordant back pain and radiculopathies, more on the left side, was reported. At L5-S1, an abnormal discogram with leakage through multiple tears in the annulus, extending into the epidural space and into the neural foramina bilaterally was reported along with severe concordant back pain and radiculopathies, more on the left. (CX-5, pp. 1-3; EX-18, pp. 14, 18).

Claimant's intradiscal marcaine and celestone injections at L3-L4, L4-L5, L5-S1 indicated Claimant complained of severe concordant back pain and a positive provocative test at each level, more so at L4-L5 and L5-S1. Claimant experienced mild to moderate pain relief "about 20-40%." The impression noted a successful Marcaine and steroid injection with mild to moderate pain relief and a positive Marcaine challenge test. (EX-18, p. 15).

Claimant's pain management consultation included physical

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[10] On December 7, 2000, Dr. Ghadially recommended invasive pain management, a discogram and post-discogram CT scan in a report that was sent to Dr. Denman. (EX-18, pp. 10-12).

examination which revealed tenderness to palpation in the low lumbar area through the left buttock and thigh with no atrophy or neurological deficit. Straight-leg raising test was "strongly positive, more on the left than the right." A Patrick's test was negative bilaterally. Claimant was directed to avoid lifting heavy objects or excessive physical activity. Claimant's treatment plan included: (1) lumbar epidural steroid injection treatment three times for the following two to eight weeks; (2) if the lumbar epidural steroid treatment was unsuccessful, facet injection and block treatment from L3-S1 bilaterally, particularly on the left; (3) active physical therapy for two to eight weeks; and (4) possible orthopedic consultation. (EX-18, pp. 16-17).

After Claimant underwent his post-discogram lumbar CT scan, the following conclusions were reported: (1) a normal discogram and CT scan at L2-L3; (2) an abnormal discogram at L3-L4, where a bulging disc impinged on the thecal sac and the presence of a torn annulus was noted with significant concordant back pain and left-sided radiculopathy; (3) an abnormal discogram at L4-L5, where a herniated disc extruded "with significant mass effect to the thecal sac, resulting in significant spinal and foraminal stenosis, more on the left," along with a torn annulus and severe concordant back pain and radiculopathies, more on the left; (4) an abnormal discogram at L5-S1, including a torn annulus with severe concordant back pain and left-sided radiculopathy; and (5) a large herniated disc at L5-S1 which impinged upon the thecal sac and left S1 nerve root. (EX-18, pp. 19-20).

Memorial Hermann Baptist Hospital

Claimant treated at the Memorial Hermann Baptist Hospital (MHBH) several times between September 1992 and March 2002. He sustained an injury to his left forearm in a motor vehicle accident on September 5, 1992. X-rays of his chest revealed well-maintained disc spaces in the cervical spine. (EX-3, pp. 1-9). Claimant complained of a sore throat in January 1994, when he was diagnosed with sinusitis. (EX-3, pp. 10-18). He treated for chest pain on June 10, 1994, when treatment revealed no pulmonary disease. (EX-3, pp. 19-33).

On September 20, 1995, Claimant treated at MHBH for burns to his face and eyes sustained while welding. He was prescribed Vicodin with instructions against driving and drinking. (CX-3, pp. 34-38). In November 1996, Claimant returned to MHBH for treatment for chest pains and an irregular heart beat. (EX-3,

pp. 39-61).

On June 27, 2000, Claimant requested a release to return to work following a back injury he sustained while moving furniture. He did not see an emergency room physician at the time of injury. Claimant reported a history of prior back pain and injury and noted the quality and severity of his pain was "similar to prior back pains." He was diagnosed with acute myofascial lumbar strain which resolved. He was prescribed Advil and Aleve and released to return to work to full duty by the emergency room physician. (EX-3, pp. 62-71).

On December 1, 2000, Claimant returned to MHBH for treatment following a November 30, 2000 automobile accident in which he was a passenger in the front seat of a car that was hit on the driver's side by an "18-wheeler" and "knocked into a median wall." No obvious injuries were present, but Claimant's chief complaint was a neck and back injury involving "neck" pain and "upper" back pain between his shoulders. He was diagnosed with neck strain and prescribed Flexeril, Lortab and Advil or Aleve. X-rays of Claimant's cervical and thoracic spine revealed loss of the lordotic curve in the cervical spine consistent with paraspinous muscle spasm and mild degenerative arthritis of the thoracic spine. No other bone or joint abnormalities were noted. (EX-3, pp. 72-85).

On July 25, 2001, Claimant returned to MHBH to treat for complaints of low back pain following a July 24, 2001 car accident. Claimant was diagnosed with neck strain and lumbar strain and was restricted from work for two days. Cervical and Lumbar spine X-rays revealed no change in the cervical area since Claimant's December 1, 2000 cervical X-ray, but revealed "chronic degenerative disc disease of L4-5" and "mild degenerative arthritis in a generalized fashion." (EX-3, pp. 86-100).

On March 10, 2002, Claimant returned to MHBH to treat for a laceration he received to his face, apparently his right eyebrow, when he struck a steering wheel during an automobile accident. He was diagnosed with a laceration, provided five stitches which would be removed two days later, and was restricted from work on March 11, 2002. (EX-3, pp. 101-110).

Gregory W. Hanson, M.D.

On July 24, 2001, Claimant was evaluated by Dr. Hanson, a board-certified orthopedic surgeon, at the request of DOL.

Claimant reported complaints of ongoing back pain which radiated into his left leg following an injury on the job in 1999. Claimant reported treating with several physicians and attempting to return to work unsuccessfully due to his pain. (CX-4, p. 70; EX-11, p. 26; EX-54).

Physical examination revealed moderate obesity, restricted motion of the lumbar spine, positive straight-leg raising bilaterally which produced buttock pain. After a review of Claimant's December 26, 2000 X-rays and his November 30, 2000 MRI, Dr. Hanson reported degenerative changes at L4-L5 with a calcified disc herniation. The MRI was of "suboptimal quality," but indicated "severe degeneration from L3 to S1 with disc herniation centrally at L4-5 and L5-S1 with the largest one being at L5-S1." Dr. Hanson recommended a myelogram and post-myelogram CT scan "to further delineate the pathology in his back," which would "dictate subsequent recommendations regarding treatment." (EX-11, p. 26).

Dr. Hanson reported an "addendum," in which he noted Claimant underwent a myelogram and post-myelogram CT scan,[11] which appeared to indicate vertebral osteophytic ridges at both L4-5 and L5-S1 with no definite evidence of disc herniation or nerve root compromise." Dr. Hanson concluded Claimant suffered three-level degenerative disc disease. Because he found no evidence of nerve root compression, Dr. Hanson opined Claimant was not a candidate for "any type of surgical procedure on his lower back." Dr. Hanson recommended conservative treatment and noted Claimant had not reached maximum medical improvement. (EX-11, p. 27).

Gulf Coast Diagnostics

On October 10, 2001, Claimant underwent a lumbar myelogram with Dr. Ghadially. A post-myelographic CT scan was subsequently performed by Dr. Morris Berk, whose credentials are not of record. "No overt abnormalities" were reported. At L3-L4, neither disc pathology nor foraminal stenosis was noted. At L4-L5, a small disc herniation impinged upon the subarachnoid space, and no neural foraminal stenosis was noted. At L5-S1, a

[11] There is no evidence of a myelogram or a post-myelogram CT scan included with Dr. Hanson's records; however, Dr. Hanson is ostensibly referring to Claimant's October 10, 2001 lumbar myelogram and post-myelogram CT scan. (EX-11; CX-4, pp. 175-178).

central disc herniation lateralizing to the left impinged upon the subarachnoid space. S1 exiting nerves appeared normal. The rest of the CT scan was within normal limits. (CX-4, pp. 175-178).

Gulf Coast Orthopaedic and Spine Associates

On October 18, 2001, Dr. Ghadially's radiographic examination of Claimant's lumbar spine revealed "traction osteophytes and some disc space collapse at L4-5. Clinical correlation for instability, with flexion and extension views, MRI, etc. is recommended." (CX-4, p. 174).

James A. Ghadially, M.D.

On December 16, 2002, the parties deposed Dr. Ghadially, who is board-certified in orthopedic surgery, spinal surgery and pain management. To satisfy the requirements for board-certification in spinal surgery, a physician must be either a board-certified neurosurgeon or orthopedic surgeon and must perform approximately 70 to 75 surgeries annually. (CX-3, pp. 4-6; CX-4, pp. 1-12).

On November 26, 1999, Dr. Ghadially initially treated Claimant per the referral of Dr. Denman, who has referred patients to Dr. Ghadially for years; however, Dr. Ghadially had no records of that visit.[12] (CX-3, pp. 6-8). Dr. Ghadially prescribed Ultram, Flexeril nd Celebrex. Claimant did not return for refills. (CX-3, pp. 73-74).

On October 19, 2000, Dr. Ghadially treated Claimant, who reported he was unable to return to Dr. Ghadially sooner because Dr. Ghadially was not the "company doctor" who a former insurance adjuster would approve. Claimant returned to Dr. Ghadially upon the approval of a new adjuster. (CX-3, pp. 8-9; CX-4, pp. 171-173).

Claimant reported sustaining an injury to his back from falling over wires while crawling through a manhole cover at work. He complained of back and leg pain; however, neck and

[12] A November 26, 1999 Consent to Treat/Assignment of Benefits form signed by Claimant in favor of Dr. Ghadially's company, Gulf Coast Orthopaedic and Spine Associates, indicates Claimant consented to receive treatment from the company for any medical condition and/or injury. (CX-4, p. 59).

shoulder pain reported in the November 1999 visit had improved. Claimant reported numbness, shooting pain down his buttocks and below and aching pain in his low back. Physical examination revealed pain with range of motion and restriction of motion. Neurologically, Claimant was generally normal; however, straight-leg raising and a sacral iliac notch test were positive, indicating nerve root irritation and sciatic nerve irritation.[13] Id.

At the October 19, 2000 visit, Dr. Ghadially did not receive a history of Claimant's June 2000 hospital visit for back pain which developed after moving furniture. Dr. Ghadially was unaware that Claimant was released to return to full-duty work after the June 2000 hospital visit. Likewise, Dr. Ghadially did not inquire of any other incidents causing Claimant any back or neck pain other than the October 25, 1999 job injury. Dr. Ghadially did not confirm Claimant's report that he was not using medications on October 19, 2000. (CX-3, pp. 71-73; CX-4, pp. 171-173).

On November 30, 2000, Claimant underwent an MRI which Dr. Ghadially recommended. The results of the MRI indicated three herniated discs at L3-L4, L4-L5, L5-S1. The MRI indicated pressure on the S1 nerve root which causes leg pain and sciatic nerve irritation. Although some normal degeneration may be expected in someone of Claimant's age, the extent of the herniation revealed in Claimant's MRI results was unexpected and indicated bulging discs that are typically traumatically induced. Based on Claimant's MRI results and results on physical and neurological examination, Dr. Ghadially opined Claimant's herniated discs caused pressure or chemical irritation of the nerves which results in disc instability and increased back pain. (CX-3, pp. 10-12; EX-12, pp. 1-2).

On December 26, 2000, Claimant underwent a discogram, CT scan and post-discogram Marcaine challenge. The discogram indicated Claimant's normal discs were asymptomatic while his abnormal discs were painful. The CT scan, which reported large bulging discs, confirmed the earlier MRI results which revealed three herniated discs. The post-discogram Marcaine challenge

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[13] Claimant was prescribed nonsteroidal anti-inflammatories and muscle relaxers. (CX-4, p. 173). Dr. Ghadially's "Medication Log" and refill information indicate Dr. Ghadially prescribed Vicodin and Zanaflex which were regularly refilled following October 19, 2000. (CX-4, pp. 79-127).

was positive, indicating pain relief was obtained at the problematic disc spaces. (CX-3, pp. 12-15).

According to Dr. Ghadially, the lack of a radicular component to pain does not establish that surgery is unnecessary or that a person does not suffer from an injury or pain; however, he noted that there are "some old neurosurgeons perhaps still out there who's [sic] never done a fusion and haven't read the literature" who conclude otherwise. He noted simple diskectomies are useful for treating leg pain, while fusions, which have been performed successfully for a "long, long time," are useful in treating back pain.[14] He explained that pain without radicular components may be caused by damage to fibers associated with the posterior foramina ramus. The damage may irritate the fibers to cause back and leg pain. (CX-3, pp. 15-18).

On December 10, 2001, Claimant underwent a myelogram and post-myelogram CT scan which revealed two herniated discs at L4-L5 and L5-S1. Dr. Ghadially explained that the December 10, 2001 results were different from Claimant's December 26, 2000 results because no dye was injected into Claimant's discs for the December 2001 testing and because no MRI, which would be "sensitive to soft tissues," was performed in December 2001. Consequently, the December 2001 CT scan revealed only the pressure occurring on the sac. If the disc space at L3-L4 was

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[14] On January 18, 2001, Dr. Ghadially reported, "The reason we have recommended a fusion in this patient is because his back pain complaints are greater than the leg pain complaints," based on "documented evidence of axially generated type of pain complaints that would not be improved by a decompression type procedure." (CX-4, p. 165). On March 1, 2001, Claimant desired to return to work and live with his back pain. (CX-4, p. 162). On April 12, 2001, Claimant reported that his back pain was bearable, but his leg pain was not. Consequently, Dr. Ghadially recommended a laminectomy, neural foraminotomy, decompression and discectomy rather than a fusion at L4-L5 and L5-S1. (CX-4, pp. 160-161). On May 24, 2001, Dr. Ghadially reported Claimant received a second medical opinion by a physician who was not identified in the report. The physician opined Claimant should undergo a simple discectomy instead of a fusion, and Claimant agreed, noting his leg pain was worse than his back pain. (CX-4, p. 158). After July 5, 2001, Claimant's back pain persisted and gradually increased until he reported the pain was unbearable. (CX-4, pp. 139-141, 145-150, 154, 156-157).

damaged, the herniation would not appear as significant as it would on other studies. (CX-3, pp. 18-19).

Based on the December 2000 and 2001 studies, Dr. Ghadially concluded Claimant suffered a three-level symptomatic disc herniation at L3-L4, L4-L5, L5-S1. He opined Claimant's condition was caused by his job injury with Employer. (CX-3, p. 19).

Dr. Ghadially testified Claimant originally treated with him after failing conservative treatment with Dr. Denman. Dr. Ghadially recommended various medications and discussed surgery with Claimant, who initially expressed reluctance to undergo the risks associated with surgical treatment. At one point, he recommended Claimant "could think about trying to just live with the pain and go through a work-hardening type program" to train Claimant to perform lighter jobs. (CX-3, pp. 19-22).

On March 1, 2001, Claimant desired to return to his prior occupation, but Dr. Ghadially recommended against it. Rather, Dr. Ghadially tried to convince Claimant to change jobs to a lighter-duty occupation. (CX-3, p. 21; CX-4, p. 162).

On April 12, 2001, Claimant complained of back and intolerable leg pain that periodically varied in intensity. Surgery was again considered, and Claimant requested a second opinion. Consequently, Dr. Ghadially referred Claimant to Dr. Hanson for a second opinion.[15] (CX-3, pp. 22-24). On October 30, 2002, Dr. Ghadially treated Claimant for the last time. Claimant, whose condition did not improve, desired surgical intervention. (CX-3, pp. 25-26; CX-4, p. 160).

Dr. Ghadially has never released Claimant to return to

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[15] On cross-examination, Dr. Ghadially testified he did not recommend Dr. Hanson in this matter, but had no objection to the referral of Claimant to Dr. Hanson for a second opinion. (CX-3, p. 84). By letter dated August 17, 2001, Dr. Ghadially was informed by Counsel for Employer/Carrier that DOL referred Claimant to Dr. Hanson for an independent medical examination which resulted in Dr. Hanson's recommendation for additional testing. Dr. Ghadially was asked by Employer/Carrier to perform the tests recommended by Dr. Hanson and to forward the results of the tests to Dr. Hanson for his review. (CX-4, p. 70). A myelogram and post-myelogram CT scan recommended by Dr. Hanson were performed on December 10, 2001. (CX-4, pp. 175-178).

work. Dr. Ghadially requested authorization for a laminectomy on May 24, 2001 and for a fusion on January 18, 2001 and June 13, 2002. Because surgery has not been approved by Carrier, Claimant has not yet reached maximum medical improvement. Without any surgery, Dr. Ghadially opined Claimant reached maximum medical improvement and could return to light-duty work on January 3, 2002; however, Dr. Ghadially requested a functional capacity evaluation. He opined that Claimant's return to medium-level exertional employment would cause Claimant to "inexorably show up again with a new claim." Dr. Ghadially opined that, prior to January 3, 2002, Claimant should seek medical treatment rather than return to work. (CX-3, pp. 27-28, 31-32, 35-36).

According to Dr. Ghadially, "light-duty" includes lifting twenty pounds occasionally, ten pounds frequently. Claimant's light-duty release would also include restrictions against working at heights, bending, stooping, heavy lifting, squatting, pushing and pulling. Ideally, Claimant should change positions every thirty or forty minutes during an eight-hour workday. Dr. Ghadially would prefer Claimant to perform sedentary job with no bending, stooping, lifting or carrying; however, such limitations would make it difficult for Claimant to find employment, depending on his educational level. Consequently, "the next best thing" is light-duty work, which Claimant could probably perform if he applies proper lifting mechanics. Driving heavy equipment would be "quite damaging to the disks" due to vibration; however, a "limited amount of driving" would not be problematic. Dr. Ghadially recommended Claimant should avoid driving while taking prescription pain medications, including Vicodin and Zanaflex, which cause drowsiness. (CX-3, pp. 28-31).

Dr. Ghadially opined Claimant could not return to medium-level welding jobs, but could possibly return to light-duty welding jobs requiring work on small items. Welding should be performed at table-height without bending. (CX-3, pp. 34-35).

Dr. Ghadially testified patients in general construction occupations return to their prior work beyond their physical restrictions and limitations "all the time" because "people have to eat." Although Dr. Ghadially advises his patients not to return to their prior occupations, they often disregard his advice. Claimant often indicated he would return to his prior occupation despite Dr. Ghadially's restrictions; however, Dr. Ghadially did not know whether Claimant actually returned to his prior occupation. (CX-3, pp. 36-37). Likewise, he added that

his patients often return to lighter-duty employment but perform beyond their physical restrictions and limitations. (CX-3, pp. 45-46).

Dr. Ghadially estimates surgery and rehabilitation for Claimant's condition would cost between $75,000.00 and $100,000.00. With surgery, Dr. Ghadially was optimistic that Claimant could quit using medications with addictive or dangerous side-effects in favor of ibuprofen or Ultram. Without surgery, Claimant will experience pain for a long time or forever and will remain on his current medications until he no longer responds to them, at which time the medications will be replaced by other similar medications. Based on his experience, including his treatment of thousands of spinal patients over 27 years, Dr. Ghadially opined that ongoing back pain often causes other changes in patients, including depression, marital problems and loss of the motivation to return to work. (CX-3, pp. 37-40).

Dr. Ghadially was unaware Claimant was evaluated by Dr. Weiner, but indicated Dr. Weiner would be a "logical person" for an employer to refer patients because he has never performed a fusion and "can be predicted upon to negate and find nothing wrong with people." Dr. Ghadially reviewed Dr. Weiner's reports and noted Dr. Weiner recommended a discectomy, based upon significant problems on April 4, 2001. However, on March 23, 2002, Dr. Weiner changed his opinion and recommended against surgery. Dr. Ghadially indicated recommendations for surgery may differ among treating physicians and evaluating physicians, but noted the objective results obtained through physical examination and objective testing confirm Claimant's complaints. He also indicated there is a certain amount of subjectiveness to a patient's decision to seek surgery, which is partly a function of an individual's pain tolerance. Despite the opinions of the evaluating physicians, Dr. Ghadially opined the recommended surgery is necessary and reasonable, based on his treatment of Claimant. (CX-3, pp. 40-45).

According to Dr. Ghadially, qualified therapists' on-site job analyses of the physical demands and requirements of jobs are more accurate than written job descriptions provided by employers because it is difficult to describe in writing what physical demands and restrictions are actually involved with certain jobs. Moreover, he noted that therapists have a medical and functional background to estimate the likelihood of whether a patient may return to an occupation within his or her physical restrictions and limitations. (CX-3, pp. 46-47).

Dr. Ghadially recalled Claimant reporting a history of injury following a car wreck, but did not opine it was "any major intervening event." He recalled Claimant's medications were not changed. He noted Claimant "already had the herniations." Dr. Ghadially opined Claimant's subsequent injuries were unrelated to his current condition because positive objective test results were closely linked to the time of Claimant's work injury. (CX-3, pp. 48-49).

On cross-examination, Dr. Ghadially admitted he is missing records documenting his initial visit with Claimant on November 26, 1999. He admitted his office does not take notes of patients' visits. Although there are notes in his file documenting some of Claimant's visits, Dr. Ghadially has no explanation how the notes were entered into the file. Although he produced an authorization request to release Claimant's medical records from other physicians, Dr. Ghadially could not recall which physicians specifically provided him copies of Claimant's medical records. He may have used the release request for the records of Drs. Weiner and Hanson, but has no evidence in his records that he obtained copies of Claimant's medical records from any other physicians. (CX-3, pp. 50-55; CX-4, p. 17).

On October 19, 2000, Dr. Ghadially was unaware whether Claimant treated with any other physicians. Dr. Ghadially has "no evidence that I asked him, and he didn't tell." Although he typically asks patients to identify the type of treatment they have been receiving, Dr. Ghadially's notes from that visit include no reference to any physician's medical treatment of Claimant prior to the October 19, 2000 visit. Dr. Ghadially admitted nobody from his office asked Claimant to identify physicians who had been treating him between November 4, 1999 and October 19, 2000. (CX-3, pp. 55-57; CX-4, pp. 171-173).

Dr. Ghadially admitted he has no copies of records from Drs. Craig, Villegas, or Beck. Likewise, he has no records of the Tower Medical Center in Nederland, Texas or Memorial-Hermann Baptist Hospital in Orange, Texas. Dr. Ghadially has no medical records from Dr. Beck, which would "certainly be relevant." Likewise, he never tried to obtain records of any other physicians who treated Claimant prior to October 2002, because he was unaware the records existed. Other than emergency room treatment at the time of the job injury, Dr. Ghadially thought Claimant was only treated by Dr. Denman. Dr. Ghadially never obtained records of Claimant's emergency room treatment. (CX-3,

pp. 57-59).

Dr. Ghadially was unaware of Claimant's June 27, 2000 emergency room visit for back and cervical complaints related to moving furniture until Dr. Ghadially's December 16, 2002 deposition. (CX-3, pp. 59-60). Dr. Ghadially admitted Claimant did not report any history of his November 30, 2000 car accident, including emergency room treatment for back and neck complaints, when Dr. Ghadially treated Claimant on December 7, 2000, at which time Dr. Ghadially reported Claimant developed no substantial medical problems since November 9, 2000. (CX-3, pp. 79). Dr. Ghadially has reviewed no X-rays related to the car accident, nor does he know what medications, if any, were prescribed by the emergency room following the November 30, 2000 automobile accident. (CX-3, p. 73).

Claimant told Dr. Ghadially he treated with an emergency room on July 25, 2001 for back and neck pain following a July 24, 2001 car wreck. Dr. Ghadially did not discuss the circumstances of the wreck in his report and did not order copies of any X-rays taken pursuant to Claimant's treatment after the car wreck. (CX-3, pp. 87-88).

Dr. Ghadially admitted Claimant's November 30, 2000 MRI included dessication, or dehydration, which could be a function of the aging process or a herniation. (CX-3, p. 75). According to Dr. Ghadially, the determination whether degenerative disease is traumatic in origin "depends upon the time line and it depends upon the number of levels. It depends upon the balance of the spine. It depends upon the history." He added that, when a 60 or 70-year-old person exhibits herniations and degenerative disease "fresh after the accident," it is not "always that easy to decide which is which." (CX-3, pp. 75-78).

However, Dr. Ghadially opined the degenerative changes observed on Claimant's tests are abnormal and related to something other than normal aging. Specifically, Dr. Ghadially noted, "the degeneration has occurred because a year earlier he had three herniated disks and now the disks being damaged have broken down. That's my take on why he has degenerative disk disease." (CX-3, pp. 94-95).

Dr. Ghadially admitted he never followed-up with Dr. Hanson after Dr. Hanson's July 24, 2001 recommendation for a myelogram and post-myelogram CT scan which Dr. Hanson opined would "dictate subsequent recommendations regarding treatment." When he received a copy of the July 2001 report shortly after it was

prepared, Dr. Ghadially interpreted Dr. Hanson's language to mean Claimant needed surgery; however, Dr. Ghadially believed Dr. Hanson was simply unsure what type of surgery Claimant needed.[16] Dr. Ghadially never read Dr. Hanson's subsequent report, which was based on additional testing, until his December 16, 2002 deposition and was "surprised that he turned around and has a report that says something else." (CX-3, pp. 60-63).

Dr. Ghadially disagreed with Dr. Hanson's opinion that Claimant is not a candidate for any type of surgical procedure on his lower back. He was unsure of Dr. Hanson's qualifications as a neurosurgeon to perform fusions, but believed Dr. Hanson is certainly qualified to perform laminectomies. (CX-3, pp. 64-65).

During his treatment of Claimant, Dr. Ghadially was unaware Claimant was employed. He assumed Claimant was not working because Dr. Ghadially did not release him to return to work. Dr. Ghadially admitted his reports do not indicate Claimant's work restrictions, but noted he provided a work status slip indicating Claimant was off work on December 7, 2000. Dr. Ghadially has no information regarding Claimant's employment between November 26, 1999 and October 2002. (CX-3, pp. 80-82; CX-4, pp. 46, 48, 164-165).

Dr. Ghadially's practice includes offering biofeedback, group psychotherapy, treatment for weight loss, and treatment related to workers' compensation claims. He once sued other physicians for interfering with his relationship with plaintiffs' personal injury lawyers. (CX-3, pp. 65-68). Dr. Ghadially sees all patients on initial visits; however, patients may be seen by a physician's assistant on all follow-up visits because Dr. Ghadially does not have time to personally visit all of his patients. Whether a patient is seen on follow-up is determined by a random "lottery" based on which room a patient

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[16] On August 23, 2001, Dr. Ghadially's assistant, Jeffrey Young, treated Claimant. Mr. Young reported Claimant was "originally scheduled for a 360 [degree] fusion for two very large herniated discs in his lumbar spine" but underwent an independent medical examination with another physician who "told him that he needed a myelogram performed before okaying his surgery." According to Mr. Young, "the second opinion doctor suggested he have just a laminectomy. We will try to get that approved for him at this time." (CX-4, pp. 154-155).

enters and which assistant or physician becomes available to visit that patient first. (CX-3, pp. 69-71). On August 23, 2001, Claimant treated with Dr. Ghadially's assistant. (CX-3, pp. 86-87).

Dr. Ghadially testified Claimant's outstanding medical bills related to his treatment of Claimant for the compensable injury amount to $1,095.00. Dr. Ghadially presented Claimant's account ledger, which identified a number of services, the dates of the services, a brief description of the services and the amount invoiced. (CX-3, p. 49; CX-4, pp. 13-14).

Bruce Roger Weiner, M.D.

On January 9, 2003, Dr. Weiner, who is board-certified in orthopedic surgery, was deposed by the parties. Dr. Weiner treats and performs surgeries on backs, shoulders, knees, hands, feet and elbows. He has actively practiced orthopedic surgery since 1975 and currently performs an average of ten surgeries, including diskectomies and laminectomies, per week. Less than ten percent of his practice is devoted to providing medical examinations for carriers involved in disputed matters. (EX-1, pp. 6-9; EX-53).

On April 2, 2001, Dr. Weiner physically examined Claimant and his MRI films at Employer/Carrier's request. Claimant reported a history of back pain with radiation into his left leg following a back injury on October 25, 1999, when he tripped over some wires while crawling through a hole at work. Claimant stated therapy was unhelpful and that his treating physician recommended surgery. Claimant reported no prior back injuries or problems. Upon physical examination and testing, Dr. Weiner found "no abnormal reflexes, motor strength or sensation." Claimant was "essentially normal." (EX-1, pp. 9-10).

On April 4, 2001, Dr. Weiner reported Claimant "definitely did not need a three-level fusion." Because Claimant's exam was normal, Dr. Weiner desired to review more of Claimant's medical records. If Claimant's additional medical records indicated surgery might become necessary, Claimant would require at most a "simple one-level laminectomy with perhaps looking at another level."[17] On July 23, 2001, after he reviewed additional medical

[17] On April 4, 2001, Dr. Weiner noted Claimant's condition was likely related to his October 25, 1999 injury because Claimant reported "no previous trouble with his leg or back" and

records, including Claimant's diskogram films and post-diskogram CAT scans, which confirmed spinal abnormalities, Dr. Weiner's opinions remained unchanged. (EX-1, pp. 10-14, 21-22; EX-2, pp. 32-35).

On March 23, 2002, after a review of "many more" medical records, including post-injury employment information and MRI films, X-rays and discogram results, Dr. Weiner opined Claimant suffered from degenerative changes that "most likely in all probability predated the episode in 1999."[18] He noted Claimant's

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that his leg and back became problematic "immediately after this episode on October 25, 1999." Dr. Weiner questioned whether Claimant could perform heavy physical labor with a herniated disc. He noted Claimant's heavy physical work as a pipefitter would

> indeed aggravate this. If he was complaining to no one of any significant pain, this may well have been a pre-existing condition which we see frequently and may have just been an aggravation of the original problem. Therefore, I would feel that continuing work would cause further problems with this condition.

(EX-2, p. 34). Dr. Weiner opined Claimant should be restricted from heavy physical labor "no matter what happens for his protection and the protection of the company he is working for" because Claimant was "complaining a lot and because he does have abnormal tests." Id. at 34-35. He added:

> It would also be nice to see if any records of this patient complaining of previous troubles with his back or any records of previous diagnostic tests done on this patient's back. I would also be very interested to see work records from October through June to see if this patient was complaining of any problems with his back in that period of time. If he wasn't, I'm not sure this injury had anything to do with anything other than irritation of his low back.

Id. at 35.

[18] In the March 23, 2002 report, Dr. Weiner apparently considered Claimant's October 10, 2001 myelogram and post-myelogram CT scan, based on hand-written entries which are presumably his notes; however, he did not significantly discuss the specific results of those tests in his deposition or his

MRI was abnormal; however, he opined the extent of nerve root compression was insufficient to cause symptoms. He opined Claimant sustained an October 25, 1999 back strain that resolved three weeks later when Claimant returned to full-time work as a welder for another employer. Likewise, Claimant reached maximum medical improvement when he returned to work following the injury. He opined Claimant was restricted to sedentary duty only during the three weeks following his job injury. Thereafter, Claimant was not restricted from returning to heavy work. (EX-1, pp. 19-24; EX-2, pp. 24-25).

Dr. Weiner opined Claimant was not a candidate for surgery based on Claimant's discogram, which was abnormal at multiple levels. Dr. Weiner stated, "the majority of reasonable, prudent orthopedic surgeons will say that with more than two levels abnormal, the results of surgery are usually very, very poor, so it would be wise not to operate on these patients." He noted subjective complaints of pain are natural by-products of discograms which increase pressure in the disc space when dye and marcaine are injected into the disc space. Accordingly, he opined pain relief of only twenty to forty-percent does not warrant further surgery. (EX-1, pp. 25-26).

On December 9, 2002, after a review of additional medical and employment information, Dr. Weiner affirmed his March 23, 2002 opinions. Dr. Weiner opined Claimant was restricted from working "for the few weeks that he was resting afterwards, and I think there were no further restrictions." He concluded Claimant suffered no permanent impairment as a result of the October 25, 1999 injury. He disagreed with Claimant's ongoing prescriptions for powerful and "very addicting" pain medication. He opined Claimant should be using much less powerful or over-the-counter pain medications. Because Claimant established a history of returning to work following each injury he sustained, Dr. Weiner concluded "the cause of each individual back problem is the episode that occurred before that complaint." (EX-1, pp. 14-18, 22-25, 34-35; EX-2, pp. 18, 20, 24-25).

Dr. Weiner opined his conclusions would be buttressed by assumptions that: (1) Claimant secured and performed post-injury employment, including multiple jobs as a welder/pipefitter; (2)

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report. Dr. Weiner reported Claimant's "diagnostic tests did not indicate anything that needs surgery and this is backed up by the fact that he has done lots of hard work since this alleged episode [Claimant's October 1999 job injury]." (EX-2, pp. 25, 30).

Claimant reported he was fully recovered from his October 1999 lower back muscle strain on an employment application; and (3) Claimant passed pre-employment physical examinations. (EX-1, pp. 19-21).

Dr. Weiner agreed with Dr. Hanson's opinions that: (1) Claimant suffers from a three-level degenerative disc disease; (2) there is no evidence of nerve root compression; and (3) Claimant is not a candidate for lower back surgery. Dr. Weiner agreed with post-injury X-ray findings that Claimant suffers from degenerative arthritis of his thoracic spine and chronic degenerative disc disease at L4-5. He added Claimant needed no surgery because Claimant was "functioning too well," relying on Claimant's deposition testimony indicating that Claimant missed no time from post-injury work due to a back injury except for one incident involving moving furniture. (EX-1, pp. 17-21, 32-33).

Dr. Weiner disagreed with Dr. Hanson's opinion that Claimant has not reached maximum medical improvement. Because Dr. Hanson failed to report Claimant's post-injury employment, Dr. Weiner concluded Dr. Hanson did not possess Claimant's post-injury employment history or deposition testimony that demonstrated Claimant returned to work without complaint for over a year following his injury. With the additional history, Dr. Weiner opined Dr. Hanson would have found that Claimant reached maximum medical improvement, although Dr. Weiner did not identify the date Claimant would have reached maximum medical improvement. (EX-1, pp. 30-31).

Dr. Weiner opined there is "no way" to exclude either Claimant's October 25, 1999 job injury or his subsequent back injuries on June 27, 2000 and November 30, 2000 as possible causes for the abnormalities indicated on his November 30, 2000 MRI. However, he noted Claimant "got fully better" and returned to work for "well over a year" after the job injury, which might indicate the subsequent incidents were responsible for Claimant's abnormal MRI. Regardless, he opined "there is no way to tell at all what caused the abnormality." (EX-1, pp. 26-27).

Dr. Weiner also opined there is no way to distinguish whether Claimant's current complaints of back pain are related to his October 1999 job injury, the June 2000 furniture moving incident or the subsequent 2000 and 2001 automobile accidents. He noted Claimant's subsequent medical treatment is partly related to his underlying degenerative disc disease, which may "wax and wane so you feel good one day and you don't feel good

the next day." He noted Claimant "missed virtually no work" as a result of the insults to his back, which implies Claimant "gets better each time and then has another episode that gets him worse." (EX-1, pp. 27-30).

On cross-examination, Dr. Weiner testified he does not perform pre-employment physicals, but provides return-to-work physicals. He performs "one fusion for 50 laminectomies." He has never used metallic instrumentation in performing fusions. He decided to forego training in performing fusions with instrumentation because his experience from treating thousands of patients is that "very few people need those procedures." If he occasionally treats a patient who requires such treatment, Dr. Weiner will refer the patient to a specialist who performs fusions with instrumentation. (EX-1, pp. 36-38).

Dr. Weiner testified he was provided Claimant's records of medical treatment with Dr. Ghadially through October 2001. On physical examination, Dr. Weiner opined Claimant suffered no root compression as a result of his degenerative disc disease, although Claimant complained of pain upon examination. Dr. Weiner opined Claimant suffered from degenerative disc disease prior to October 1999, possibly related to an episode in 1993; however, he believed Claimant's October 1999 job injury aggravated his condition. (EX-1, pp. 42-44).

Dr. Weiner opined Claimant's statements in his post-injury employment records that his back problem resolved and that he desired to return to work indicated Claimant was no longer symptomatic. He agreed individuals often return to work out of economic necessity and that potential employers might not hire candidates with a history of ongoing back complaints for heavy-duty positions. (EX-1, pp. 44-47).

Dr. Weiner admitted he received limited post-injury employment records from Counsel for Employer/Carrier. Although Claimant reported to his employers he was asymptomatic, his complaints to Dr. Ghadially indicated otherwise. (EX-1, pp. 46-48).

Dr. Weiner described a back strain as a stretching of ligaments caused by falling or stretching muscles in an unusual manner. Such an injury could cause chronic pains in individuals who are not candidates for surgery. A conclusion that a patient is not a candidate for surgery does not result in a conclusion that the patient is capable of returning to their prior occupation. (EX-1, pp. 49-50).

Dr. Weiner acknowledged he originally restricted Claimant from heavy physical labor on April 4, 2001. Dr. Weiner explained he returns patients to work without restrictions where, as here, the injured patients potentially may be at risk of further injury, but desire to return to their jobs nonetheless. If Claimant could choose between a lighter duty job or his heavier-duty post-injury employment, Claimant should probably opt for the lighter-duty job. (EX-1, pp. 51-53).

Dr. Weiner changed his April 2001 and July 2001 opinions that Claimant had not reached maximum medical improvement upon reviewing Claimant's post-injury employment records in which Claimant reported his back injury resolved and that he desired to return to heavy-duty jobs. Dr. Weiner was unaware whether Claimant's post-injury employment was continuous and uninterrupted; however, he indicated Claimant worked for "Gulf Pro" from October 2001 through January 2002, "so that was at least one period where he worked three to four months." (EX-1, pp. 53-54; EX-2, p. 31).

Dr. Weiner admitted he has no record of Claimant's misuse of prescribed medications. Likewise, he has no records indicating Claimant's post-injury employment was adversely affected by the use of medication. (EX-1, pp. 56-57).

Dr. Weiner testified that Claimant's October 1999 job injury has not contributed to Claimant's current condition because Claimant admitted to his treating physician and potential post-injury employers that his back problem resolved and that he desired to return to work. Moreover, Dr. Weiner noted Claimant returned to work and continued to remain at work without having "to quit the job because of marked increase in back or leg symptoms." (EX-1, pp. 57-58).

Dr. Weiner's opinion would not change if Claimant testified he was unable to perform all of his post-injury jobs due to back pain because the physical requirements of each post-injury job could cause the "exact same type of symptoms" and because Claimant showed no evidence of severe pain behavior or nerve root irritation on physical examination.[19] (EX-1, p. 58).

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[19] Dr. Weiner did not identify the specific physical demands and requirements of Claimant's specific post-injury occupations.

On further examination, Dr. Weiner testified his opinions regarding Claimant's exertional ability were based on Claimant's subjective complaints of pain and the objective evidence of degenerative discs. Dr. Weiner opined the extent of Claimant's degenerative discs on diagnostic testing indicated the condition pre-existed the testing for "well over a year." Further, Claimant "is 5 foot 10, 280 pounds, has not done any physical labor for a number of years, and most likely has a non-normal back." Dr. Weiner explained Claimant's height and weight cause extra stresses on the back, which will have a higher probability of degenerative changes. (EX-1, pp. 58-61).

Dr. Weiner testified he has no records indicating Claimant experienced ongoing problems after a 1993 back injury. However, he opined Claimant probably would have had an abnormal discogram prior to October 1999. (EX-1, pp. 61-62).

The Contentions of the Parties

Claimant seeks compensation benefits and medical benefits as a result of his October 25, 1999 job injury. He argues he is temporarily and totally disabled since the date of his termination by Employer. He contends he has not reached maximum medical improvement based on the opinion of Dr. Ghadially, who recommended surgery that has been denied by Employer/Carrier. Claimant desires to receive surgical treatment. He argues his average weekly wage should be computed under Section 10(c) of the Act, based on his earnings in two years prior to his October 25, 1999 job injury. He argues his actual post-injury earnings do not fairly or reasonably represent his post-injury wage-earning capacity because he performed his post-injury job duties only out of economic necessity and through extraordinary effort.

Employer/Carrier argue Claimant sustained a back strain from which he reached maximum medical improvement within weeks. They assert Claimant's actual earnings from his post-injury employment as a pipefitter establish his post-injury wage-earning capacity which is approximately the same rate as his pre-injury wage rate. They argue Claimant needs no surgery as a result of his job injury. They agree Section 10(c) of the Act provides the most reasonable and appropriate estimation of Claimant's average weekly wage.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel,

346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Credibility

The administrative law judge has the discretion to determine the credibility of a witness. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); See also Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972); Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999).

I found Claimant's hearing testimony generally unequivocal and credible. He candidly discussed his criminal prosecutions and penalties which were related to a burglary that occurred well over ten years ago. He admitted incorrectly reporting information to potential employers, which I find is testimony that is arguably against his interest that buttresses his credibility.

Claimant's testimony that he incorrectly reported recovering from his job injury and returned to work because he thought he would be responsible for paying medical bills which he could not afford is consistent with the testimony of Drs.

Weiner and Ghadially that patients often return to work out of economic necessity. Likewise, Claimant's testimony that he incorrectly reported that he was asymptomatic despite ongoing pain is buttressed by Dr. Weiner's testimony that Claimant continued reporting complaints of pain to Dr. Ghadially despite Claimant's reports to prospective employers that he was asymptomatic.

Notably, some employers of record hired Claimant despite his reported history of drug use and a back condition. However, Claimant's perception that he needed to misrepresent his back condition on employment applications is buttressed by Dr. Weiner's testimony that employers might not hire candidates with a history of ongoing back complaints.

I find Claimant's testimony regarding his post-injury condition is generally supported by objective findings and medical examinations. X-rays shortly after the job injury indicated evidence of a straightening of the lordotic curve consistent with muscle spasm. Likewise, his X-rays revealed decreased disc space at multiple levels which is consistent with findings on Claimant's subsequent discogram, MRI and myelogram. Numerous physicians diagnosed Claimant's job injury as a muscle strain, which could cause chronic pains in individuals who are not surgical candidates, according to Dr. Weiner. Consequently, I find Claimant's testimony is credible and beneficial for a resolution of the instant matter despite inconsistent reports to physicians and various potential employers.

Employer/Carrier argue Dr. Ghadially's credibility is entirely undermined because: (1) he was unaware Claimant worked at several heavy-duty positions while he treated Claimant; (2) Dr. Ghadially treated Claimant in a "vacuum" because he failed to review easily available records of Claimant's subsequent accidents; (3) Dr. Ghadially's office practices are unorthodox; and (4) Drs. Weiner and Hanson disagree with Dr. Ghadially's surgical recommendation.

Prefatorily, Dr. Ghadially is the only physician of record who is board-certified in spinal surgery, orthopedic surgery and pain management. Dr. Weiner, who is board-certified in orthopedic surgery admitted he refers patients to more qualified physicians to perform fusions with instrumentation, a procedure which Dr. Ghadially performs. According to his resume, Dr. Hanson delivered a presentation on Anterior Cervical Decompression and Fusion in 1988 and published an article on microscopic anterior cervical decompression and fusion in 1989.

(EX-54). However, it is not otherwise apparent Dr. Hanson is as qualified as Dr. Ghadially regarding surgical lumbar fusion involving instrumentation.

I find Claimant's post-injury employment does not diminish the persuasiveness of Dr. Ghadially's opinions. Employer argues Dr. Ghadially incorrectly assumed Claimant's post-injury complaints were "so severe that Claimant could not work following his injury." Dr. Ghadially's testimony that Claimant might successfully return to light or sedentary duty with restrictions following his injury and his recommendation for an FCE to establish Claimant's restrictions indicates he did not incorrectly assume Claimant could not work post-injury because Claimant failed to report his post-injury employment history.

Moreover, I find Claimant's testimony that he worked at various post-injury positions with an increased amount of pain and the fact of Claimant's post-injury accident while moving furniture, although not an employment activity, arguably buttress Dr. Ghadially's opinion that Claimant's return to heavy-duty labor may present a risk to himself or to an employer. Accordingly, I am not persuaded to entirely discredit Dr. Ghadially's opinions for Claimant's failure to report post-injury employment.

I find Dr. Ghadially's failure to review the entirety of Claimant's medical record does not entirely diminish the persuasiveness of his medical opinions. Dr. Ghadially's failure to consider post-injury medical records which were generated prior to his treatment of Claimant, whose complaints of pain were consistent before and after Dr. Ghadially's treatment, does not diminish the fact of Claimant's injury which was verified through physical examination and diagnostic testing by other physicians, including Drs. Villegas and Beck.

Although Dr. Ghadially admitted he did not consider Dr. Beck's opinion, Employer/Carrier have not established how Dr. Ghadially's failure to consider Dr. Beck's medical opinion, which was based on Claimant's complaints of ongoing back and leg pain since his job injury, undermines the persuasiveness of Dr. Ghadially's opinion that Claimant suffers from ongoing back and leg pain from his job injury. Further Dr. Weiner's concession that there is no medical evidence indicating Claimant experienced ongoing back problems prior to his October 1999 job injury buttresses Dr. Ghadially's opinion that Claimant's present condition is related to his October 25, 1999 job injury.

Moreover, the records of Claimant's post-job injury treatment for his subsequent accidents do not establish the subsequent accidents were anything more than temporary exacerbations of Claimant's post-job injury condition, as discussed more thoroughly below. Consequently, I am not persuaded that Dr. Ghadially's medical opinions are entitled to no probative value because he failed to consider the entirety of Claimant's medical records.

I find Employer/Carrier's argument that Dr. Ghadially's medical opinions should be discredited because his office is "unusual and contributes to confusion" is not persuasive. Specifically, Employer/Carrier argue Dr. Ghadially should be discredited because of his questionable objectivity which may be inferred by the facts that his office provides services such as biofeedback and weight consultation and that his office owns an MRI machine and a pharmacy. There is insufficient factual support establishing that Dr. Ghadially's medical opinions are completely biased because of the services his office provides or the assets it owns. Accordingly, I find Dr. Ghadially's business decisions do not diminish his ability to render a qualified medical opinion based on his expertise, experience, and superior credentials.

Employer/Carrier argue Dr. Ghadially's medical opinions should be discredited because he does not personally visit patients during the entirety of their follow-up visits and because his office does not memorialize every visit. Dr. Ghadially's credible testimony that his assistants are qualified to provide follow-up consultation with patients is uncontroverted. Moreover, Claimant's November 1999 consent and release in favor of Dr. Ghadially corroborates Dr. Ghadially's testimony that Claimant treated at his office on that date. Thus, I find Employer/Carrier's argument that Dr. Ghadially's opinions should be entirely discredited because his assistants conducted follow-up visits and his office does not memorialize every visit with its patients is unpersuasive.

Moreover, Employer/Carrier's argument that Claimant occasionally treated with assistants overlooks at least ten visits in which Dr. Ghadially personally visited Claimant and reported his treatment plan. Although Employer/Carrier argue it is difficult to establish how Dr. Ghadially directly supervised his assistants, there is no evidence the assistants were unsupervised by Dr. Ghadially. Thus, I find Employer/Carrier's argument that Dr. Ghadially's opinions should be discredited because Claimant returned for follow-up treatment with Dr.

Ghadially's assistants is unpersuasive.

Lastly, I find Dr. Ghadially's medical opinions should not be entirely discredited because two evaluating physicians offered conflicting views regarding the necessity of surgery. As noted by Dr. Ghadially, physicians often disagree. Notably, Dr. Weiner presently disagrees with Dr. Hanson on the subject of maximum medical improvement. Accordingly, I am not persuaded Dr. Ghadially's medical opinions should be entirely dismissed based on the contrary opinions of the evaluating physicians.

B. Causation of Claimant's Condition

Although the parties stipulated Claimant sustained a compensable injury on October 25, 1999, Employer/Carrier argue Claimant's present condition is the result of pre-existing degenerative disc disease rather than the compensable injury which merely aggravated the pre-existing condition.

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

Claimant credibly testified he experienced ongoing complaints of back and leg pain following his job injury. His testimony is supported by the record, which includes abnormal MRI, discogram, myelogram and X-ray results and which indicates Claimant reported complaints of ongoing leg and back pain following his job injury. His testimony is further buttressed by Dr. Weiner's opinion that a muscle strain, with which Claimant was diagnosed following the October 1999 job injury, may cause chronic pain in patients who are not surgical candidates.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on October 25, 1999 and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332

F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Employer/Carrier produced Dr. Weiner's opinion that Claimant suffers from a pre-existing degenerative disc disease which causes his back problems rather than ongoing pain related to the October 1999 injury. Consequently, I find Employer/Carrier rebutted the Section 20(a) presumption and must weigh the record as a whole for a resolution of the instant matter.

3. Weighing all the Record Evidence

Drs. Ghadially and Weiner offered opinions on causation of Claimant's condition. I find Dr. Ghadially's opinions are more persuasive and supported by the record, while I find Dr. Weiner's opinions lack factual support and are, at times, speculative and vacillating.

Dr. Ghadially's persuasive opinion that Claimant's condition is the result of degenerative changes in Claimant's spine at an area where objective findings established abnormalities shortly after the October 25, 1999 job injury is buttressed by: (1) Claimant's pre-injury medical reports indicating Claimant did not suffer ongoing back and leg complaints prior to October 25, 1999; (2) Claimant's post-injury 1999 X-rays which revealed straightening of the lordotic curve consistent with muscle spasm and decreased disc space at L4-L5; (3) Claimant's subsequent MRI, discogram, myelogram and X-ray results indicating degenerative changes at multiple levels, including L4-L5, in Claimant's spine; and (4) Claimant's medical records indicating Claimant continued complaining of back and leg pain with other physicians, namely Drs. Denman, Beck, Hanson and Weiner, following his job injury.

Dr. Ghadially's opinion is buttressed by Dr. Weiner's testimony that Claimant's particular frailties, namely his alleged pre-existing degenerative disc condition and excessive weight that adds stress to the spine, predisposed Claimant to bodily hurt from even minimal trauma such as sneezing or simply getting out of bed, which is persuasive in establishing Claimant was potentially at risk while performing heavy labor for Employer. Accordingly, I find Dr. Ghadially's opinion that Claimant's condition was caused by his job injury is persuasive.

On the other hand, the persuasiveness of Dr. Weiner's opinion that Claimant suffers from a pre-existing degenerative disc disease which is "possibly" related to a 1993 back injury and which was "aggravated" by Claimant's October 1999 job injury is undermined by his admission that there are no medical records indicating Claimant suffered any ongoing problems following the 1993 injury. Likewise, Dr. Weiner's speculation that a pre-injury discogram would reveal abnormal results in Claimant's spine lacks factual support in the record which contains no supporting pre-injury diagnostic test results of Claimant's lumbar spine.

Moreover, Dr. Weiner's medical opinion that Claimant

sustained no impairment or restriction from his job injury and could return to his prior occupation, was vacillating. He elsewhere opined Claimant should seek lighter duty work than he previously performed. Likewise, he originally opined that Claimant should be restricted from returning to heavier exertional work "no matter what happens" because of ongoing complaints and abnormalities, yet later opined Claimant could return to work, despite ongoing complaints and abnormalities.

Consequently, I find the record does not support a conclusion that Claimant suffered any pre-existing degenerative disc disease prior to his employment with employer. Nevertheless, assuming **arguendo** that Claimant suffered a pre-existing degenerative disc disease prior to his employment, an aggravation of a pre-existing condition is compensable under the Act, as noted above. See Bludworth, supra; Volpe, supra; and Britton, supra.

Additionally, Dr. Wiener's opinion that Claimant's October 1999 injury did not cause or contribute to his current condition because Claimant's post-injury employment establishes a full recovery is undermined by his admission that he did not consider the continuity of Claimant's post-injury employment. Dr. Weiner demonstrated a lack of understanding of Claimant's post-injury employment. For instance, he specifically identified only one employer, "Gulf Pro," who employed Claimant for "three to four months" from October 2001 through January 2002; however, the record indicates Claimant worked roughly one week in October 2001 and two weeks in November 2001, for a three-week period of employment of not more than forty hours per week. Thereafter, Claimant did not return to work with Gulf Pro until the week of January 13, 2002, when he worked for a total of three more weeks until February 2002. Thus, Claimant's tenure with Gulf Pro amounts to two distinct three-week periods interrupted by nearly two months. Accordingly, I find Dr. Weiner's opinions based on post-injury employment history are not as well-reasoned as Dr. Ghadially's opinions based on medical treatment.

Likewise, Dr. Weiner's testimony that his opinions would not change even if Claimant reported that he was unable to perform post-injury work due to back pain further undermines his opinion and arguably reveals bias in his opinions. Dr. Weiner's explanation that Claimant's post-injury jobs would cause the exact same type of complaints, is undermined by his failure to identify neither the physical requirements of each post-injury job nor the duration of the jobs, which lasted as little as four hours. As noted above, Dr. Weiner's admission that Claimant

continued treating for complaints of pain during times he purportedly was asymptomatic further diminishes the probative valur of his opinion. Consequently, I find Dr. Weiner's opinions based on Claimant's employment history are neither well-reasoned nor entitled to great probative value.

Further, I am not persuaded to conclude Claimant's condition resolved because there is evidence on pre-employment physicals that Claimant's spine was "normal." Claimant's uncontroverted testimony establishes his pre-employment physicals were brief and inconclusive. Dr. Weiner's admission that he does not perform pre-employment physicals fails to diminish the persuasiveness of Claimant's description of the physicals. Further, it is noted that the pre-employment physicals Claimant underwent in September 2000 and December 2000 both resulted in the check-the-box conclusion Claimant's spine was "normal;" however, Claimant's November 2000 MRI and December 2000 discogram revealed multiple lumbar spinal abnormalities at different levels. I find the contrary results reached by the pre-employment physicals and the discogram and MRI undermine the persuasiveness of results reported in Claimant's pre-employment physical exams. Consequently, I am not persuaded that Claimant's pre-employment physicals establish Claimant's post-injury back condition had resolved.

Lastly, a finding that Claimant's condition completely resolved within three weeks based on employment records ignores the objective medical results observed in Claimant's X-rays and subsequent diagnostic testing which reveal degenerative changes in Claimant's lumbar spine post-injury. Consequently, based on the well-reasoned and factually supported opinions of Dr. Ghadially, I find Claimant's condition is related to his October 1999 job injury rather than an alleged pre-existing degenerative disc disease.

C. Intervening Causes

Employer/Carrier argue Claimant's June 27, 2000 injury while moving furniture and the automobile accidents involving injuries on April 7, 2000, November 30, 2000, July 24, 2001 and March 10, 2002, constitute intervening causes which terminate Employer/Carrier's liability for Claimant's condition. Claimant argues the accidents merely temporarily exacerbated his work-related symptoms.

If there has been a **subsequent non-work-related injury or aggravation**, the employer is liable for the entire disability if

the second injury is the natural or unavoidable result of the first injury. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (CRT) (5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954)(if an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986).

If, however, the subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is the result of an intervening cause such as the employee's intentional or negligent conduct, the employer is relieved of liability attributable to the subsequent injury. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); Cyr v. Crescent Wharf & Warehouse Co., supra; Colburn v. General Dynamics Corp., 21 BRBS 219, 222 (1988); Grumbley v. Eastern Associated Terminals Co., 9 BRBS 650 (1979); Marsala v. Triple A South, 14 BRBS 39, 42 (1981); See also Bailey v. Bethlehem Steel Corp., 20 BRBS 14 (1987).

Where there is no evidence of record which apportions the disability between the two injuries it is appropriate to hold employer liable for benefits for the entire disability. Plappert v. Marine Corps. Exchange, 31 BRBS 13, 15 (1997), aff'd 31 BRBS 109 (en banc); Bass v. Broadway Maintenance, 28 BRBS 11, 15-16 (1994); Merrill, 25 BRBS at 144-145; Leach v. Thompson's Dairy, Inc., 13 BRBS 231 (1981).

Moreover, if there has been a subsequent non-work-related event, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that Claimant's condition was caused by the subsequent non-work-related event; in such a case, employer must additionally establish that the first work-related injury did not cause the second accident. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989).

The Fifth Circuit has set forth "somewhat different standards" regarding establishment of supervening events. Shell Offshore, Inc. v. Director, OWCP, 122 F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997). The initial standard was set forth in Voris v. Texas Employers Ins. Ass'n, which held that a supervening cause was an influence originating entirely outside of employment that overpowered and nullified the initial injury. 190 F.2d 929, 934 (5th Cir. 1951). Later, the court in Mississippi Coast Marine v. Bosarge held that a simple "worsening" could give rise to a supervening cause. 637 F.2d

994, 1000 (5th Cir. 1981). Specifically, the court held that "[a] subsequent injury is compensable if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause." Id.

Claimant's subsequent June 27, 2000 injury was the result of either intentional or negligent conduct while moving furniture at home. Claimant's April 7, 2000 automobile accident appears to have been caused by his own negligence. The details of his March 10, 2002 accident are not included in Claimant's medical report, but the accident was ostensibly either caused by his own intentional or negligent conduct or the intentional or negligent conduct of a third party. There is no allegation nor any evidence that Claimant's work-related injury caused the accidents on April 7, 2000, June 27, 2000, or March 10, 2002. Accordingly, I find these post-injury accidents were not the natural or unavoidable results of Claimant's work-related injury. Thus, the injuries may constitute intervening causes of a subsequent injury occurring outside of work to relieve Employer's liability for the subsequent injuries.

However, despite Employer/Carrier's contentions that all of Claimant's subsequent injuries are "wholly unrelated to the work injury of October 25, 1999," the record establishes Claimant was involved in automobile accidents when he was in Houston, Texas, en route to undergo an MRI on November 30, 2000, and when he again traveled to Houston, Texas on July 24, 2001 to submit to Dr. Hanson's independent medical examination related to the instant claim. An injury that occurs as a result of treatment for a work-related condition also is work-related. Guilliam v. Tubular Technology, Inc., BRB No. 02-0829 (Ben. Rev. Bd. Sep. 4, 2003)(unpub.) (a Claimant was properly entitled to the Section 20(a) presumption in his claim for a back injury where his testimony that he injured his back while exiting a helicopter on the way to a hospital to treat for a stroke sustained on the job was credited by an administrative law judge)(citing Mattera v. M/V Antoinette, Pacific King, Inc., 20 BRBS 43 (1987); Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1986).

Likewise, many state courts have held injuries occasioned by a trip to a doctor's office compensable when the initial injury was compensable. LeMaire v. Operators & Consulting Services, Inc., 31 BRBS 471 (ALJ) (1997) (an automobile accident while traveling to physical therapy prescribed as medical treatment for a job injury was compensable) (citing Telcon, Inc., v. Williams, 500 So. 2d 266 (Fla. App. 1986) (the court

affirmed an award based on a "quasi course of employment" analysis where a claimant was injured in the course of a trip to the doctor's office occasioned by a compensable injury); and McElroy's Case, 397 Mass. 743, 494 N.E.2d 1 (1986) (the trip was generated by and necessitated by the employment relation).

A finding that Claimant's November 30, 2000 and July 24, 2001, automobile accidents may be considered independent and superceding causes that sever Employer/Carrier's liability for Claimant's compensable job injury would be inconsistent with the holdings cited above that establish injuries sustained in the automobile accidents would themselves be compensable. Consequently, I find Claimant's subsequent accidents on November 30, 2000 and July 24, 2001 are injuries which may not constitute intervening causes of an injury occurring outside of work to relieve Employer/Carrier's liability for Claimant's subsequent injuries.

Nevertheless, although Claimant may have visited an emergency room on several occasions for various complaints following the subsequent events, there is insufficient evidence of record indicating Claimant's condition became worse or that it was overpowered and nullified by any of his subsequent injuries. The record does not establish Claimant was asymptomatic and sustained a full recovery following his job injury, as noted above. Further, there is insufficient evidence establishing Claimant's subsequent injuries were severe enough to worsen, nullify or overpower his condition.

Claimant's uncontroverted testimony indicates he experienced symptoms which temporarily exacerbated the symptoms he continually experienced since his October 1999 job injury. There is no evidence Claimant continued seeking follow-up treatment for the subsequent injuries or that he related any of his ongoing complaints of pain to any of the subsequent injuries. Rather, Claimant continued treating for pain he related to his job injury.

Notably, Claimant admitted his "second" automobile accident was more forceful than his first and aggravated his back "a little more" when he discussed the November 30, 2000 and July 24, 2001 accidents at the hearing. Because Claimant was ostensibly discussing the July 24, 2001 accident, which he sustained while returning from an independent medical examination and which he reported to Dr. Ghadially, he was referring to an event which is not considered an independent superceding event, as discussed above. Likewise, if Claimant

was referring to the November 30, 2000 accident, which was the accident that followed his April 7, 2000 accident, he was referring to the accident which occurred en route to his MRI, which is not considered an independent or superceding cause terminating Employer/Carrier's liability, as discussed above.

Moreover, Claimant's first evidence of lumbar disc pathology occurred in Claimant's post-injury 1999 X-rays that revealed decreased disc space and a straightening of the lordotic curve consistent with muscle spasm roughly five months **before** any subsequent accident. Consequently, I find Dr. Ghadially's opinion that Claimant's condition is related to his job injury, based on objective results observed following the job injury, is more persuasive and supported by the record.

Dr. Weiner's opinion that there is "no way" to exclude Claimant's job injury or subsequent events as possible causes for Claimant's abnormal MRI is not helpful in establishing that any of the subsequent accidents worsened or overpowered and nullified Claimant's condition after his October 1999 job injury. Although Dr. Weiner opined the subsequent events might be responsible for Claimant's abnormal MRI, he based his opinion on the fact that Claimant "got fully better," which is not established in the record. Consequently, I find Dr. Weiner's opinion that there is "no way" to exclude Claimant's job injury or his subsequent injuries as possible causes for his condition unpersuasive in establishing Claimant's subsequent events worsened or overpowered and nullified his post-injury condition.

Assuming **arguendo** that there is substantial evidence of record establishing Claimant's subsequent accidents worsened his condition, the record does not establish to what extent the possible intervening causes overpowered or nullified Claimant's original condition following his job injury. An apportionment of Claimant's disability may not be determined based on Claimant's medical record. Likewise, the vocational evidence, which does not apportion any diminution of wage-earning capacity among the various accidents, is of no assistance in resolving the matter. Thus, I find no reasonable basis on which to apportion any disability among Claimant's injuries. Thus, Employer/Carrier are liable for the entire disability. See Plappert, supra.

D. Nature and Extent of Disability

The parties stipulated that Claimant suffers from a compensable injury, however the burden of proving the nature and

extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir.

1994). A medical disability may exist to a substantial extent but the claimant may be working for some special reason despite the physical condition, such as a determination to work long enough to retire, **economic necessity** (*e.g.*, 'to feed the family'), or even a determination to simply work through Christmas." Id. at 656 (citing 2 A. Larson, Workmen's Compensation Law § 57.31 (1974))(emphasis added). Devillier v. National Steel and Shipbuilding Co., 10 BRBS 649 (1979).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

E. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981). If surgery is anticipated, maximum medical improvement has not been reached. Kuhn v. Associated Press, 16 BRBS 46 (1983).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Drs. Ghadially, Weiner and Hanson offered opinions on maximum medical improvement. For the reasons stated above, I find Dr. Weiner's opinion that Claimant's condition resolved when he returned to post-injury employment is neither persuasive nor factually supported. As discussed more thoroughly below, I find Dr. Ghadially's recommendation for surgery is well-reasoned and factually supported.

Consequently, based on Dr. Ghadially's opinion that Claimant has not yet reached maximum medical improvement due to pending surgery, which is consistent with the medical opinion of Dr. Hanson, who generally opined Claimant has not reached maximum medical improvement, I find Claimant has not yet reached maximum medical improvement. All periods of disability are therefore considered temporary under the Act.

Of the witnesses in this matter, I find Claimant is most familiar with the requirements of his former occupation and the symptoms of his ongoing condition. According to Claimant, his prior occupation included frequent climbing, bending, stooping and lifting five pounds regularly and up to fifty pounds occasionally. Claimant's persuasive testimony regarding post-injury low back and left-leg pain which is made worse by bending, stopping, lifting more than twenty pounds, continuous walking or exercise and driving or sitting for more than thirty minutes is persuasive in establishing Claimant cannot return to his prior occupation.

Employer/Carrier argue Claimant "has not produced one witness, even his wife, to bolster his claim that he can't do his usual work." I find Employer/Carrier's argument is without merit, as the record is replete with documentation and medical testimony supporting Claimant's contentions.

Claimant's description of ongoing back and leg pain made worse by various physical activities is generally supported by his complaints to Physical Therapy Associates and Drs. Craig, Villegas, Beck, Denman, Ghadially and Hanson and by the objective medical evidence, including the discogram, post-discogram CT scan and MRI. Further, Claimant's testimony regarding factors which aggravate his condition are buttressed by the restrictions assigned by Dr. Ghadially and others. In November 1999, Drs. Villegas and Denman originally restricted Claimant from returning to any work due to symptomatology and objective findings. Likewise, Dr. Weiner originally restricted Claimant from returning to heavy work because of Claimant's ongoing complaints of pain and spinal abnormalities.

Dr. Ghadially restricted Claimant from returning to any post-injury work, pending surgery, based on ongoing complaints of pain and objective results obtained through diagnostic testing. Without surgery, Dr. Ghadially opined Claimant's post-injury and work-related condition includes restrictions against heavy lifting, working at heights, bending, stooping, heavy

lifting, squatting, pushing and pulling and prolonged sitting or standing. Dr. Ghadially has not released Claimant to return to work. Although Dr. Villegas returned Claimant to work on December 3, 1999, Dr. Denman's restriction does not appear to have been removed.

Moreover, Dr. Ghadially recommended an FCE, as did Dr. Denman, who also recommended an impairment rating. There are no results of an FCE or impairment rating of record which establish Claimant's physical limitations and restrictions. Consequently, without objective evidence indicating Claimant may return to work without restrictions, I am persuaded to conclude Claimant established he is unable to return to his prior occupation by offering persuasive testimony which is buttressed by objective medical data and medical opinions. In light of the foregoing, I find Claimant has established a **prima facie** case of total disability following his October 25, 1999 job injury while working for Employer.

Employer/Carrier argue Claimant is not restricted from returning to his prior occupation, based on Claimant's post-injury vocational and medical records and on Dr. Weiner's later opinion that Claimant may return to his prior occupation. I find the record does not establish Claimant may return without restriction to his former occupation.

For the reasons discussed more thoroughly below, I find Claimant's post-injury employment, which was brief, sporadic and beyond his restrictions, is not persuasive in establishing Claimant may return to his prior occupation. Claimant, who raises four children with his wife who works night shifts, offered persuasive, uncontroverted testimony that he inaccurately reported a recovery for economic reasons after he was terminated while undergoing physical therapy. Claimant's testimony is corroborated by the record which establishes his benefits were terminated shortly after his injury and his termination from employment with Employer occurred while he was undergoing physical therapy. Claimant's treatment for ongoing symptoms during times when he was purportedly asymptomatic at work further buttresses Claimant's testimony that he worked despite ongoing pain. Consequently, I find Claimant's return to work does not establish he may return to his prior occupation without restrictions or any impairment at his previous wage-earning ability.

Further, I find Claimant's treatment for post-injury accidents and pre-employment physicals are unpersuasive in

establishing Claimant may return to his prior occupation. Claimant treated briefly for his post-injury accidents and provided an incorrect history of accidents and recovery, as noted by Employer/Carrier in their brief which indicates "Claimant told the emergency room personnel on this [July 25, 2001] admission that he had 'no herniated disc.'" Claimant's inaccurate reports of his medical history do not diminish the objective results of herniated discs at multiple levels which were previously seen on Claimant's MRI and discogram. Likewise, I find the results of Claimant's pre-employment physical examinations are not persuasive in light of the other objective evidence of multiple abnormalities seen contemporaneously on Claimant's MRI and discogram, as noted above. Consequently, I find Claimant's post-injury medical and vocational records do not establish he may return to his prior occupation.

As discussed above, I find Dr. Weiner's opinions that Claimant may return to medium and heavy-duty labor without restrictions are not well-reasoned and lack factual support. Accordingly, I find Claimant successfully established a **prima facie** case of total disability under the Act.

F. Suitable Alternative Employment and Wage-earning Capacity

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain

fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988).

The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on

the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

1. Claimant's Post-Injury Work

Employer/Carrier contend Claimant's return to post-injury employment establishes the various jobs he performed were suitable alternative employment. They further allege Claimant's post-injury jobs were terminated due to reductions in force or for personal reasons unrelated to Claimant's back injury.

The facts of this matter are analogous to the facts presented in Carter v. General Elevator Co., 14 BRBS 90 (1981). There, the Claimant was a service mechanic for an elevator company when he was injured on December 20, 1976. He continued working for the employer for five weeks following the accident until he was laid off. He subsequently found employment as a construction mechanic for another elevator company with which he worked for five months until he was again laid off on April 3, 1977. Claimant later worked intermittent jobs at a gas station and aided his spouse with her maintenance job, but did not return to work in the elevator trade. The claimant sought disability benefits which were awarded by an administrative law judge. 14 BRBS at 91-92.

The Board in Carter affirmed the administrative law judge's determination that the claimant demonstrated a present inability to perform his prior job as an elevator service mechanic based on various physicians' medical opinions, one physician's recommendation for surgery, and the transcript which was "replete with claimant's references to back pain experienced under a variety of circumstances." Id.

In Carter, the Board noted that the claimant's three and one-half month return to a position with a post-injury employer in the same industry could not rebut a claim for total disability without a showing on the part of employer that such a position was currently available to the claimant. The availability or non-availability of service mechanic jobs was also insufficient, inasmuch as the evidence established the claimant's inability to perform the heavy labor associated with such work. Moreover, the claimant's failure to seek full-time employment after being laid off was not dispositive because the Board noted an "employer is the party faced with the burden of showing alternative employment opportunities." 14 BRBS at 96-97. The Board also found that Claimant's other post-injury

work, namely working at a gas station, did not rise to the level of an ongoing actual employment opportunity and does not alone provide a basis for an award of partial disability, rather than temporary total disability benefits. Id. at 97-98.

Like the facts in Carter, Claimant presented a **prima facie** case of total disability based on the record, which includes various physicians' medical opinions, Dr. Ghadially's recommendation for surgery, and the transcript and medical records which are replete with claimant's references to back pain experienced under a variety of circumstances. Thus, the employer must meet its burden of showing suitable alternative employment.

Employer/Carrier offered insufficient evidence establishing the post-injury jobs Claimant performed are currently available. Moreover, the availability or non-availability of construction jobs, including medium or heavy occupations as a pipefitter, shipfitter or fitter/welder are also insufficient, inasmuch as the evidence establishes Claimant's inability to perform the heavy labor associated with such work. Specifically, Claimant was restricted from any work pending a recommendation for surgery by his treating physician, who was previously credited with the most persuasive medical opinion of record. Further, Claimant's physician credibly and persuasively testified Claimant could, at most, perform sedentary or light duty work with numerous restrictions. Otherwise, Claimant will pose a risk to himself or to employers upon a return to heavier duty occupations. As noted above, there is no evidence the functional capacity evaluations recommended by Drs. Denman or Ghadially were ever performed.

Consequently, I find the record does not establish Claimant may return to regular and continuous employment at the heavier-duty post-injury jobs which he briefly performed. Moreover, I find Claimant's failure to seek full-time employment after being laid-off is not dispositive because Employer/Carrier are the parties faced with the burden of showing alternative employment opportunities. Likewise, I find Claimant's post-injury work does not rise to the level of an ongoing actual employment opportunity and does not alone provide a basis for an award of partial disability, rather than temporary total disability benefits. Accordingly, I find Claimant's post-injury vocational record fails to establish suitable alternative employment reasonably available to Claimant within his physical restrictions and limitations.

2. Labor Market Survey

I find Mr. Quintanilla's testimony, evidence and labor market survey are unpersuasive in establishing the jobs which he identified constitute suitable alternative employment. Assuming Claimant needed surgery, Mr. Quintanilla specifically testified that Claimant should not seek the jobs identified in his labor market survey. As discussed below, Claimant established his recommended surgery is reasonable and necessary, which undermines Mr. Quintanilla's opinion that the jobs identified in his labor market survey are suitable alternative employment.

Notwithstanding the recommendation for surgery, Mr. Quintanilla's labor market survey does not establish suitable alternative employment reasonably available to Claimant within his physical restrictions and limitations. According to Dr. Ghadially, Claimant should be restricted to sedentary occupations or to light duty occupations with restrictions against heavy lifting, working at heights, bending, stooping, squatting, pushing, pulling, and prolonged sitting or standing. Mr. Quintanilla candidly admitted he relied only on the occupational classification of jobs to determine physical descriptions and requirements. He did not otherwise describe the frequency with which Claimant might be required to bend, stoop, lift certain amounts, squat, push or pull at any of the jobs identified in his labor market survey. His failure to describe the precise nature and terms of the physical requirements of the various jobs precludes a comparison of the jobs' requirements with Claimant's physical and mental restrictions based on the medical opinions of record.

Further, I find the newspaper carrier job is not suitable because the job requires a valid driver's license to fill vending machines around Beaumont. Claimant's driver's license is suspended and he currently takes prescription medication which may affect his driving that diminishes the likelihood Claimant could realistically compete for or perform the job on a full-time basis. Moreover, if Claimant should perform the job despite his drug use and a suspended license, as Employer/Carrier appear to suggest he should, the position arguably compels Claimant to increase the amount of time he would continue driving without a valid driver's license, which likely increases the risk he would again be caught and convicted of driving without a valid license. Consequently, I find the newspaper delivery job is not suitable alternative employment.

Mr. Quintanilla admitted Claimant's criminal history "could

be consideration" for prospective employers, yet he failed to establish Claimant's criminal history would not interfere with his employment opportunity as a cashier/stocker at the Family Dollar Store or the Longhorn Travel Plaza/Casino. It is noted that Claimant, in a custodial capacity for the casino, would arguably be given responsibilities other than handling money which may implicate his criminal history. It is also noted that the casino is located in Louisiana, and there is insufficient evidence establishing Claimant may commute from Orange, Texas on a regular basis to the job while using prescription medications and driving with a suspended license.

Mr. Quintanilla did not identify how the job at Alamo Cleaners would accommodate Claimant's standing restrictions, which otherwise appear to preclude the occupation from consideration as suitable alternative employment. Mr. Quintanilla was unaware of Claimant's welding abilities when he identified a welding job for Modern Manufacturing as a suitable position. Claimant's lack of certification as a MIG welder diminishes the persuasiveness of Mr. Quintanilla's opinion that the MIG welding job is a suitable alternative which is reasonably available to Claimant. Although Dr. Ghadially noted Claimant might be able to weld at table height, there is no indication in Mr. Quintanilla's labor market survey at what height Claimant would be required to weld.

Accordingly, I find none of the jobs Mr. Quintanilla identified constitute suitable alternative employment within Claimant's physical restrictions and limitations. Consequently, I find Employer/Carrier failed to establish suitable alternative employment.

3. Wage-earning Capacity

Section 8(h) of the Act mandates a two-part analysis to determine Claimant's post-injury wage-earning capacity. DeVillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 660 (1979). The first inquiry requires the undersigned to determine whether Claimant's actual post-injury wages reasonably and fairly represent his wage-earning capacity. Randall v. Comfort Control, Inc., 725 F.2d 791, 796, 16 BRBS 56, 64 (CRT) (D.C. Cir. 1984). If the actual wages are unrepresentative of the claimant's wage-earning capacity, the second inquiry requires that the judge arrive at a dollar amount which fairly and reasonably represents the claimant's wage-earning capacity. Id. at 796-97, 16 BRBS at 64. If the claimant's actual wages are representative of his wage-earning capacity, the second inquiry

need not be made. DeVillier, 10 BRBS at 660. The party that contends that the claimant's actual wages are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. Grage v. J.M. Martinac Shipbuilding, 21 BRBS 66, 69 (1988), aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990); Misho v. Dillingham Marine & Mfg., 17 BRBS 188, 190 (1985); Spencer v. Baker Agric. Co., 16 BRBS 205, 208 (1984); Burch v. Superior Oil Co., 15 BRBS 423, 427 (1983).

Moreover, the mere fact that a claimant is earning the same amount of money or more post-injury does not meet the employer's burden of proving that the claimant has suffered no loss of wage-earning capacity if the higher wages only represent inflation. Miller v. Central Dispatch, Inc., 16 BRBS 64, 68 (1984). When post-injury wages are used to establish wage-earning capacity, sections 8(c)(21) and 8(h) require that the wages earned in the post-injury job be adjusted to represent the wages which that job paid at the time of the claimant's injury. Richardson v. General Dynamics Corp., 19 BRBS 48, 49 (1986); Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691, 695 (1980). This conversion ensures that the calculation of the lost wage-earning capacity is not distorted by a general inflation or depression. Kleiner v. Todd Shipyards Corp., 16 BRBS 297, 298 (1984).

Employer/Carrier argue Claimant suffered no loss in wage-earning capacity as a result of his job injury because his pre-injury employment was sporadic and involved working for numerous employers as did his post-injury employment. Employer/Carrier's argument overlooks Claimant's total annual earnings in the years prior to Claimant's injury, when he earned more money than he did in the years following his injury. Specifically, Claimant earned the following pre-injury annual earnings: (1) $1,134.75 (1987); (2) $6,567.75 (1988); (3) $3,870.93 (1989); (4) $1,704.01 (1990); (5) $8,405.55 (1991); (6) $9,683.91 (1992); (7) $6,320.25 (1993); (8) $7,736.04 (1994); (9) $8,024.76 (1995); (10) $2,859.62 (1996); (11) $744.50 (1997); (12) $9,760.77 (1998); (13) 4,742.35 (1999 pre-injury earnings). (EX-20).[20]

[20] Claimant's post-injury 1999 earnings include $1,603.00, which he earned with Employer and $544.00, which he earned with Americon. (EX-45, p. 30; EX-63). Thus, Claimant's post-injury earnings in 1999 amount to $2,147.00 ($544.00 + $1,603.00), and

Thus, Claimant's total pre-injury annual income during the prior thirteen years, including the reduced amount of time on the job market in 1990 and 1997 when Claimant was incarcerated, amounts to $71,555.19 ($1,134.75 + $6,567.75 + $3,870.93 + $1,704.01 + $8,405.55 + $9,683.91 + $6,320.25 + $7,736.04 + $8,024.76 + $2,859.62 + $744.50 + $9,760.77 + 6,345.35 = $73,158.19), or an average annual pre-injury income of $5,504.25 ($71,555.19 ÷ 13 = $5,504.25). Claimant's average pre-injury weekly income thus amounts to of $105.85 ($5,504.25 ÷ 52 = $105.85).

Claimant's post-injury income reveals the following annual amounts:[21] (1) $2,147.00 (1999); (2) $3,448.01 (2000); (3) $3,059.82 (2001); and (4) $4,839.50 (2002).[22] (EX-20). Thus, Claimant's post-injury average annual income amounts to $3,373.58 (($2,147 + $3,448.01 + $3,059.82 + $4,839.50) ÷ 4 = $3,373.58), or an average weekly income of $64.88 ($3,373.58 ÷ 52 = $57.17). Consequently, I find Employer/Carrier's argument that Claimant's post-injury wage-earning capacity is unaffected by his injury is without merit.

Claimant argues the entirety of his post-injury condition should be considered total, despite earning income periodically from brief post-injury jobs performed for different employers. He argues his actual earnings do not represent his actual wage-earning capacity, which should be considered "zero," based on

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his pre-injury 1999 earnings were $4,742.35 ($6,889.35 - $2,147.00 = $4,742.35).

[21] A more thorough discussion of Claimant's residual wage-earning capacity, including inflation, follows. This discussion, which is provided for explication, ignores inflation, which would only lower Claimant's post-injury earnings that establish a diminution of wage-earning capacity without the application of inflation.

[22] Claimant's 2002 earnings are derived from his post-injury employment records indicating he earned $2,584.00 from Gulf Pro in January and February 2002, $410.00 from Quality Contract Services and the Meyer Group in April 2002, and $1,845.50 from CBP Industrial Maintenance, Inc. between July 2002 and October 2002. (EX-28, pp. 16-20; EX-39; EX-40, pp. 12-15; EX-46; EX-47; EX-48, pp. 19, 21, 72). Thus, Claimant's total 2002 earnings amount to $4,839.50 ($2,584.00 + $410.00 + $1,845.50 = $4,839.50).

his restrictions and condition. Post-injury employment does not necessarily preclude a finding of total disability; however, an award of total disability, concurrent with post-injury employment, is the exception and not the rule. Haughton Elevator Co. v. Lewis, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978) aff'g 5 BRBS 62 (1976); Shoemaker v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 141, 145 (1980).

An award of total disability concurrent with post-injury employment may be allowed when a claimant's return to post-injury employment is due to an extraordinary effort despite excruciating pain and diminished strength or through the beneficience of an employer. Ramirez v. Sea-Land Services, Inc., 33 BRBS 41, 46 n. 5 (1999) (if the circumstances surrounding a claimant's post-injury employment do not meet either of these criteria, factors such as claimant's pain and the physical or emotional limitations which cause him to avoid certain jobs are relevant in determining post-injury wage-earning capacity and may support an award of partial disability, based on reduced earning capacity); Walker v. Pacific Architects & Eng'rs, 1 BRBS 145, 147-148 (1974); Harrod v. Newport News Shipbuilding & Dry Dock CO., 12 BRBS 10 (1980); Collins v. Todd Shipyards Corp., 9 BRBS 1015, 1020 (1979).

Accordingly, the facts of this matter are analogous to the facts presented in Carter, supra. There, the Board reversed an administrative law judge's determination that a claimant was totally disabled during periods of concurrent post-injury earnings from employment at a gas station. The Board found no evidence that the claimant worked at the gas station because of the station owner's beneficence. It noted the arrangement between the claimant and the owner constituted a temporary exchange of labor and supervision for certain automobile parts, thus achieving the respective short term goals of claimant and the station owner. Although there was some indication that the claimant experienced back discomfort while he worked at the service station, the record did not suggest that the discomfort rose to the level of the constant and severe pain which was present in Haughton Elevator Co. v. Lewis, supra, or that claimant only managed to work through the application of extraordinary effort. Consequently, the Board concluded the administrative law judge should award temporary total disability benefits from the time claimant did not work, punctuated by temporary partial awards for the time claimant was engaged in part-time employment. 14 BRBS at 99-100.

Similarly, the record in the instant matter includes no

evidence that Claimant worked at his post-injury jobs because of the employers' beneficence. Rather, the arrangement between Claimant and the employers apparently constituted an exchange of labor and supervision for a salary, thus achieving the respective short term goals of Claimant and his employers.

Claimant's post-injury employment periodically lasted four hours or no more than one day and generally failed to last more than three weeks. Further, the jobs appear beyond Claimant's restrictions and there are no particular descriptions, e.g., bending, stooping, squatting or prolonged standing and walking, of the physical demands and requirements of Claimant's post-injury jobs which establish the jobs represent full-time work reasonably available to Claimant in his present condition. Consequently, I find Claimant's brief post-injury work is analogous to working in part-time employment or for a "trial period." See generally Souza v. Hilo Transportation & Terminal Co., 11 BRBS 218, 223 (1979) (an employer urged that a duty be imposed on claimant to try a job for a trial period based on the medical opinions of two physicians, however, the Board "cannot impose such a duty where claimant has not been released for work by his doctors" who must co-ordinate with the claimant to release him to return to work).

Moreover, Claimant's employment occurred at times when he was taking prescription "pain-killers" and undergoing medical treatment for his complaints of ongoing pain, which buttresses a conclusion he worked despite an increase in pain; however, Claimant's testimony fails to establish the level of constant and severe pain which was present in Haughton Elevator Co. v. Lewis, supra, or that Claimant only managed to work through the application of extraordinary effort. I find Claimant's ability to command regular income is dramatically limited by his physician's recommendation for surgery and restrictions as well as Claimant's credible complaints of pain and his vocational, educational and criminal history. However, I am constrained from finding Claimant was totally disabled during the periods in which he earned income.

Claimant alternatively argues his post-injury wage-earning capacity for periods of partial disability should be calculated as $56.67, which represents the average of all of his post-injury earnings over three years discounted for inflation, based on the present national average weekly wage. I disagree with Claimant's formula, which seeks to average his entire post-injury earnings that occurred at times when the national average weekly wage was lower than the present amount.

The record includes evidence of Claimant's actual wages and periods of employment which I find is more useful for an adequate determination of his post-injury wage-earning capacity. On these facts, which indicate numerous gaps in post-injury employment, I find averages that are based on the presumption that Claimant worked a 52-week year in every post-injury year are not helpful for a resolution of the matter. Consequently, pursuant to the holding of Carter, supra, and Pilkington, supra, Claimant should be awarded temporary total disability benefits from the time he did not work, punctuated by temporary partial awards for the time Claimant was engaged in part-time employment.

October 25, 1999 through November 23, 1999

For the four-week period from October 25, 1999 to November 23, 1999, Claimant earned $1,603.00 with Employer, for an average weekly wage-earning capacity of $400.75. ($1,603.00 ÷ 4 = $400.75). (EX-63, p. 1).

November 24, 1999 through December 12, 1999

Claimant earned no income and thus was totally disabled from November 24, 1999 through December 12, 1999.

December 13, 1999 through December 19, 1999

Claimant worked one week from December 13, 1999 through December 19, 1999 with Americon.[23] He earned $544.00, for an average weekly wage-earning capacity of $544.00. (TR. 61; EX-45, pp. 1-21, 30-31).

December 20, 1999 through January 2, 2000

Claimant earned no income and was thus totally disabled from December 20, 1999 through January 2, 2000.

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[23] Apparently, Claimant began working for Americon on Monday, December 13, 1999. A review of Americon's application materials indicates paychecks are provided every Friday for work performed during the prior week from Monday through Sunday. (EX-45, p. 11). Claimant was paid a total of three checks on December 23, 1999, January 14, 2000, and January 28, 2000. The December 23, 1999 check thus represents work Claimant performed during the prior week from Monday, December 13, 1999, through Sunday, December 19, 1999.

January 3, 2000 through January 16, 2000

In the two-week period between January 3 and 16, 2000, Claimant worked for Americon, earning an average weekly wage of $93.50 (($136.00 + $51.00) ÷ 2 = $93.50). (EX-45, pp. 30-31).

January 17, 2000 through January 25, 2000

Claimant earned no income and was thus totally disabled from January 17, 2000 through January 25, 2000.

January 26, 2000 through February 4, 2000

In 2000, Claimant earned a total of $1,173.00 from Zachry. During the 1.29-week period Claimant worked for Zachry between January 26, 2000 and February 4, 2000 (9 days ÷ 7 days = 1.29), he earned $1003.00, for a weekly wage-earning capacity of $777.52 ($1003.00 ÷ 1.29 = $777.52). (EX-20, p. 9; EX-25, p. 3; EX-38, pp. 8-9).

February 5, 2000 through March 28, 2000

Claimant was unemployed and thus totally disabled from February 5, 2000 through March 28, 2000.

March 29, 2000 through April 11, 2000

For the 1.86-week period from March 29, 2000 to April 11, 2000 (13 days ÷ 7 days = 1.86), Claimant earned $170.00 from Zachry, for a weekly wage-earning capacity of $91.40 ($170.00 ÷ 1.86 = $91.40). (EX-38, pp. 10-15).

April 12, 2000 through April 30, 2000

Claimant earned no income and was thus totally disabled from April 12, 2000 through April 30, 2000.

May 1, 2000 through May 25, 2000

For the 3.43-week period from May 1 through 25, 2000 (24 days ÷ 7 days = 3.43 weeks), Claimant earned $488.00 with Action Contract Services and $70.00 with A&B, for a weekly wage-earning capacity of $162.68 (($488.00 + $70.00) ÷ 3.43 weeks = $162.68). (CX-2, p. 8; EX-20, p. 10; EX-42, pp. 15-18).

May 26, 2000 through June 12, 2000

Claimant earned no income and was thus totally disabled from May 26, 2000 through June 12, 2000.

June 13, 2000 through July 5, 2000

For the 3.14-week period from June 13, 2000 through July 5, 2000 (22 days ÷ 7 = 3.14), Claimant earned $1,049.75 with Becon, for a weekly wage-earning capacity of $334.32 ($1,049.75 ÷ 3.14 = $334.32). (EX-35, pp. 1, 8-10).

July 6, 2000 through December 7, 2000

Claimant earned no income and was thus totally disabled from July 6, 2000 through December 7, 2000.

December 8, 2000 through December 12, 2000

During the week of December 12, 2000, Claimant earned a total of $488.00 with Austin Industries, for a weekly wage-earning capacity of $488.00. (EX-20, p. 10; EX-36, pp. 22-36, 42-43; 46-54, 56, 59, 64, 68).

December 13, 2000 through January 2, 2001

Claimant earned no income and was thus totally disabled from December 13, 2000, through January 2, 2001.

January 3, 2001 through January 15, 2001

During the 1.71-week period from January 3, 2001 through January 15, 2001 (12 days ÷ 7 days = 1.71 weeks), Claimant earned $1,020.00 with Conex, for an average weekly wage of $596.49 ($1,020 ÷ 1.71 = $596.49). (CX-2, p. 6; CX-14, p. 5).

January 16, 2001 through October 25, 2001

Claimant earned no income and was thus totally disabled from January 16, 2001 through October 25, 2001.

October 26, 2001 through November 11, 2001

For the 2.29-week period from October 26, 2001 through November 11, 2001 (16 days ÷ 7 days = 2.29 weeks), Claimant earned $2,040.00 with Gulf Pro through Aerostaff, for an average weekly wage of $890.83 ($2,040.00 ÷ 2.29 = $890.83). (EX-20, p.

10; EX-40, pp. 1-4).

November 12, 2001 through January 6, 2002

Claimant earned no income and was thus totally disabled from November 12, 2001 through January 6, 2002.

January 7, 2002 through February 3, 2002

In the four-week period Claimant worked with Gulf Pro from January 7, 2002 through February 3, 2002 (28 days ÷ 7 = 4 weeks), he completed three 40-hour weeks and one 32-hour week, for a total of 152 hours ((40 hours X 3) + 32 hours = 152 hours), or $2,584.00 at Claimant's $17.00 hourly rate (152 hours X $17.00 = $2,584.00), for an average weekly wage of $646.00 ($2,584.00 ÷ 4 = $646.00). (EX-39, pp. 1-7; EX-40, pp. 12-15).

February 4, 2002 through April 10, 2002

Claimant earned no income and was thus totally disabled from February 4, 2002 through April 10, 2002.

April 11, 2002 through April 25, 2002

In the two-week period from April, 11, 2002, to April 25, 2002 (14 days ÷ 7 days = 2 weeks), Claimant earned $170.00 from Quality Contract Services and $240.00 from the Meyer Group, for an average weekly wage of $205.00 (($170.00 + $240.00) ÷ 2 = $205.00). (EX-46; EX-47; EX-48, pp. 19, 21, 72).

April 26, 2002 through July 21, 2002

Claimant earned no income and was thus totally disabled from April 26, 2002 through July 21, 2002.

July 22, 2002 through October 10, 2002

In the 11.29-week period from July 22, 2002 through October 10, 2002 (79 days ÷ 7 = 11.29 weeks), Claimant earned a total of $1,845.50 with CBP Industrial Maintenance, Inc., for a weekly wage of $163.46 ($1,845.50 ÷ 11.29 = $163.46). (EX-28, pp. 1-13, 14-19).

October 11, 2002 through Present and Continuing

Claimant earned no income and was thus totally disabled from October 11, 2002 to present and continuing.

4. Inflation and the National Average Weekly Wage

The record generally supports a conclusion that Claimant was paid the wages he requested for the jobs he performed to his employers' expectations. I find Claimant's actual post-injury earnings reasonably and fairly represent Claimant's limited wage-earning capacity during the brief periods he earned income.

Because there is no evidence of the actual wages paid by Claimant's post-injury jobs at the time of Claimant's injury, the percentage increase in the yearly national average weekly wage should be applied to adjust Claimant's post-injury wages downward. Richardson v. General Dynamics Corp., 23 BRBS 327, 330-31 (1990).

In light of the foregoing, there are thirteen periods in which Claimant briefly established a weekly wage-earning capacity (Weekly Wage). In each period, there is a corresponding national average weekly wage (NAWW(post-injury)). See U.S. Dep't of Labor, National Average Weekly Wages (NAWW), Minimum and Maximum Compensation Rates, and Annual October Increases(Section 10(f))<http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm> (last accessed September 22, 2003).

At the time of Claimant's October and November 1999 injuries, the national average weekly wage was $450.64 (NAWW(at injury)). A corresponding discount rate may be derived by dividing the post-injury national average weekly wage by the national average weekly wage at the time of injury (NAWW(post-injury) ÷ NAWW(at injury) = Discount Rate). Consequently, a wage-earning capacity adjusted for inflation (Adjusted Weekly Wage) may be calculated by dividing Claimant's post-injury Weekly Wage by the Discount Rate:

Period	**Weekly Wage**	**NAWW(post-injury)**	**NAWW(at injury)**	**Discount Rate**	**Adjusted Weekly Wage**
10/25/99 through 11/23/99	$400.75	$450.64	$450.64	1	$400.75
12/13/1999 through 12/19/1999	$544.00	$450.64	$450.64	1	$544.00
1/3/2000 through 1/16/2000	$93.50	$450.64	$450.64	1	$93.50
1/26/2000	$777.52	$450.64	$450.64	1	$777.52

through 2/4/2000					
3/29/2000 through 4/11/2000	$91.40	$450.64	$450.64	1	$91.40
5/1/2000 through 5/25/2000	$162.68	$450.64	$450.64	1	$162.68
6/13/2000 through 7/5/2000	$334.32	$450.64	$450.64	1	$334.32
12/8/2000 through 12/12/00	$488.00	$466.91	$450.64	1.04	$469.23
1/3/2001 through 1/15/2001	$596.49	$466.91	$450.64	1.04	$573.55
10/26/2001 through 11/11/2001	$890.03	$483.04	$450.64	1.04	$855.80
1/7/2002 through 2/3/2002	$646.00	$483.04	$450.64	1.07	$603.74
4/11/2002 through 4/25/2002	$205.00	$483.04	$450.64	1.07	$191.59
7/7/2002 through 9/30/2002	$163.46	$483.04	$450.64	1.07	$152.77
10/1/2002 through 10/10/2002	$163.46	$498.27	$450.64	1.11	$147.26

5. Claimant's Post-injury Disability Status

As noted above, Claimant's post-injury condition is considered temporary and total for all periods in which he was not working punctuated by periods of partial disability when he briefly performed work. Pursuant to Section 6(b)(2) of the Act,

> Claimant's compensation for total disability "shall not be less than 50 per centum of the applicable national average weekly wage . . . , except that if the employee's average weekly wages as computed under Section 910 of this title are less than 50 per centum of such national average weekly wage," he shall receive his weekly wages as compensation for total disability.

33 U.S.C. § 906(b)(2). Claimant's average weekly wage pursuant to Section 10 of the Act at the time of injury was $120.82, as discussed below. The national average weekly wage at the time of injury was $450.64, as noted above. Fifty percent of the national average weekly wage at the time of injury was $255.32 ($450.64 ÷ 2 = 255.32). Claimant's average weekly wage of $120.82 is less than $255.32. Accordingly, pursuant to Section 6(b)(2) of the Act, Claimant's compensation rate during periods of total disability is $120.82.

Claimant's post-injury residual wage-earning capacity was lower than his pre-injury average weekly wage in three periods. Pursuant to Section 8(e) of the Act, Claimant is entitled to two-thirds of the difference between Claimant's average weekly wages before injury and his wage-earning capacity after the injury. 33 U.S.C. § 908(e). During the period of January 3, 2000 through January 16, 2000, Claimant's residual wage-earning capacity was $93.50, or $27.32 less than his average weekly wage of $120.82 ($120.82 - $93.50 = $27.32). Claimant's compensation rate for that period is thus $18.21 ($27.32 x .6666 = $18.21). During the period of March 29, 2000 through April 11, 2000, Claimant's residual wage-earning capacity was $91.40, or $29.42 less than his average weekly wage of $120.82 ($120.82 - $91.40 = $29.42). Claimant's compensation rate for that period is thus $19.61 ($29.42 x .6666 = $19.61). During the period of July 7, 2002 through September 20, 2002, Claimant's residual wage-earning capacity was $93.04, or $27.78 less than his average weekly wage of $120.82 ($120.82 - $93.04 = $27.78). Claimant's compensation rate for the period is thus $18.52 ($27.78 x .6666 = $18.52).

Claimant is entitled to no disability during the periods in which his adjusted post-injury weekly wages exceeded his average weekly wage at the time of injury, $120.82: (1) October 25, 1999 through November 23, 1999; (2) December 13, 1999 through December 19, 1999; (3) January 26, 2000, through February 4, 2000; (4) May 1, 2000 through May 25, 2000; (5) June 13, 2000 through July 5, 2000; (6) December 8, 2000 through December 12, 2000; (7) January 3, 2001 through January 15, 2001; (8) October 26, 2001 through November 11, 2001; (9) January 7, 2002 through February 3, 2002; (10) April 11, 2002 through April 25, 2002; and (11) July 22, 2002 through October 10, 2002. For those periods, Employer/Carrier shall not be liable for compensation benefits.

6. Credit for Advance Payments of Compensation under Section 14(j) of the Act

The Board has held that the Act does not contain a provision which entitles an employer to a credit for post-injury income which a claimant has earned. Cooper v. Offshore Pipelines International, Inc., 33 BRBS 46 (1999). Rather, the purpose of Section 14(j) of the Act is to reimburse an employer for the amount of its advance payments, where these payments were too generous, for however long it takes out of unpaid compensation found to be due. Stevedoring Services of America v. Eggert, 953 F.2d 552, 556, 25 BRBS 92, 97 (CRT) (9th Cir. 1992). Where the employer continues the claimant's regular salary during the claimant's period of disability, the employer will not receive a credit unless it can show the payments were "intended as advance payments of compensation." Argonaut Ins. Co. v. Patterson, 846 F.2d 715, 723, 21 BRBS 51, 59 (CRT)(11th Cir. 1988); Van Dyke v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 388, 396 (1978); McIntosh v. Parkhill-Goodloe Co., 4 BRBS 3, 11 (1976), aff'd mem., 550 F.2d 1283 (5th Cir. 1977), cert. denied, 434 U.S. 1033 (1978). Interest, medical expenses, and attorneys' fees are not considered "compensation" for the purposes of Section 14(j) of the Act. Castronova v. General Dynamics Corp., 20 BRBS 139, 141 (1987); Sproull, supra at 112; Guidry v. Booker Drilling Co., 901 F.2d 485, 487, 23 BRBS 82, 84 (CRT) (5th Cir. 1990).

Employer paid Claimant for post-injury work on November 7 and 21, 1999. Employer specifically refers to Claimant's post-injury income as "earnings" in its statement of Claimant's "earnings history." Claimant's earnings are also identified as "regular" pay. Employer/Carrier subsequently paid Claimant compensation benefits on December 13, 1999 for his temporary and total disability status during the period of time from November 15, 1999 through December 5, 1999. Because Employer/Carrier specifically identified Claimant's December 13, 1999 payment as compensation benefits in their Claim payment history and in their December 14, 1999 LS-208, I conclude Claimant's November 7 and 21, 1999, checks from Employer representing "regular earnings" were not intended as advance compensation. Consequently, Employer/Carrier may not receive a credit for Claimant's post-injury earnings paid by Employer or the other post-injury employers. Otherwise, Employer/Carrier paid compensation benefits on December 13, 1999 and weekly during the period of time from March 13, 2001 through June 18, 2001. Therefore, Employer/Carrier shall receive a credit for those compensation benefits they have already paid.

G. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average **annual** earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average **weekly** wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual **daily** wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

In Miranda v. Excavation Construction Inc., 13 BRBS 882 (1981), the Board held that a worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages at the employment where he was injured would best adequately reflect the Claimant's earning capacity at the time of the injury.

In addition, Claimant worked for only twelve days for Employer in the year prior to his October 25, 1999 injury, which is not "substantially all of the year" as required for a calculation under subsections 10(a) and 10(b). See Lozupone v. Stephano Lozupone and Sons, 12 BRBS 148 (1979)(33 weeks is not a

substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979)(36 weeks is not substantially all of the year). Cf. Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990)(34.5 weeks is substantially all of the year; the nature of Claimant's employment must be considered, i.e., whether intermittent or permanent).

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

I conclude that because Sections 10(a) and 10(b) of the Act can not be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

Claimant contends his earnings over the last two years prior to his injury represent the most fair and reasonable approximation of his pre-injury earning capacity, while Employer/Carrier argue it is appropriate to "mathematically average" Claimant's annual earnings during the period from 1996 through 1999, including Claimant's earnings in 1997, when his work year was truncated due to incarceration.

I find Employer/Carrier's argument similar to that offered by the employer in Daugherty v. Los Angeles Container Terminals, Inc., 8 BRBS 363 (1978). There, the employer urged the Board to "average the claimant's pre-injury earnings out over 'several' years,' on the ground that it is unfair to assess an employer for whom the claimant has worked only a short time with high compensation payments." The Board found such an argument misconstrues the nature of workers' compensation. According to the Board, an injured employee's right to compensation is not something which he or she earns through protracted service with an employer. It is "rather a statutory mechanism by which the cost of industrial accident is shifted to the employer, as the party in a position to spread those costs to the customers who benefit from an industrial activity." 8 BRBS at 365-366.

The Board in Daugherty found nothing in the Act which would reduce the compensation base because of criminal or other socially undesirable activities which have affected the claimant's earnings history. It noted that an employer may be liable for compensation commensurate with the regular wages as a shipfitter, despite the fact that a claimant who was injured on the job after only two days in his occupation as a shipfitter had only irregular earnings as a ship's cook and painter and also spent several months in prison. 8 BRBS at 366-367 (citing O'Hearne v. Maryland Casualty Co., 177 F.2d 979 (9th Cir. 1949)); See also Lozupone, 14 BRBS at 465 (1981) (an administrative law judge erred in using a mathematical average of a claimant's salaries over the five-year period prior to a job injury because the computation failed to consider wage increases prior to the injury); Gatlin, supra, at 29-30 ("when the ALJ 'calculates average annual earnings under section 10(c) by considering the [employee's] earning history over a period of years prior to injury, he must take into account the earnings of all the years within that period'").

The record presently contains Claimant's tax returns and pre-injury earnings for the years 1995 through 1999. Claimant's total pre-injury earnings include: (1) $8,024.76 in 1995; (2) $2,859.62 in 1996; (3) $744.50 in 1997; (4) $9,760.77 in 1998; and (5) $6,345.35 in 1999. A mathematical average of these amounts results in an average annual wage of $5,547.00. I find that result does not adequately reflect Claimant's earning capacity because it includes diminished earnings in 1997, when Claimant was removed from the job market due to incarceration related to a suspended driver's license.

Without citing any authority, Employer/Carrier argue Claimant has "done nothing to have his license reinstated," which subjects him to "removal from the work force to serve the maximum of one year in jail." Apparently, Employer/Carrier argue Claimant's wage-earning capacity should ignore the period of time he was incarcerated and that his future wage-earning capacity is diminished because of a potential voluntary removal from the workplace.

As noted by Employer/Carrier, Claimant is subject to time in jail and a fine of four thousand dollars, which is generally consistent with Claimant's testimony that he may not remove the suspension on his license unless he pays a party four thousand dollars. The record does not establish Claimant, who supports four children and who is restricted by his physician from any work pending surgery due to a compensable injury, possesses four thousand dollars necessary to regain his driving privileges.

Accordingly, I find that Claimant's incarceration was a non-recurring event not unlike an illness, strike, or funeral. See e.g. Klubnikin v. Crescent Wharf & Warehouse Co., 16 BRBS 182, 186 (1984) (a claimant lost time from work due to an automobile accident); Richardson v. Safeway Stores, 14 BRBS 855, 860 (1982) (claimant missed work due to a gall bladder operation). I find no basis in case law for treating his incarceration as a "voluntary withdrawal from the workforce." See Conatser v. Pittsburgh Test and Laboratory, 9 BRBS 541 (1978) (an employee routinely turned down inspecting jobs that required him to travel); Geisler v. Continental Grain Co., 20 BRBS 35 (1987) (an employee chose to work part time and do volunteer work); Daugherty, supra (there is nothing in the Act which would reduce the compensation base because of criminal or other socially undesirable activities which have affected the claimant's earnings history). I find Claimant's previous incarceration does not amount to a voluntary withdrawal from the marketplace.

Further, the record indicates Claimant received only a fine without any incarceration for his convictions of driving without a license since 1997. (EX-72, pp. 5-9). Prior to 1997, Claimant received several days of a jail sentence. (EX-72, pp. 17-22). Otherwise, Claimant's uncontroverted testimony indicates his 1997 conviction of driving on a suspended license resulted in his incarceration for a substantial part of 1997 because the conviction triggered the imposition of a sentence relating to his 1985 conviction in an unrelated matter. Moreover, the sentence related to the 1985 conviction was

discharged by Claimant's 1997 incarceration. Consequently, I find Employer/Carrier's argument that Claimant's wage-earning capacity is diminished due to the possibility he may be incarcerated is without merit.

Additionally, Claimant argues his 1999 pre-injury earnings should be adjusted upward because he only worked a fraction of the year prior to his injury. Claimant's argument implicitly presupposes Claimant would be able to work steadily for the entire year. I find insufficient evidence in the record to support such an assumption. Further, I find the record evidence of Claimant's earnings for thirteen years prior to his injury are more persuasive and have greater probative value for a resolution of Claimant's earning capacity than the use of a mathematical extrapolation. See Cummins v. Todd Shipyards Corp., 12 BRBS 283 (1980), (an administrative law judge should arrive at average annual earnings by "multiplying [a] claimant's hourly rate at the time of the injury by a time variable which reasonably represents the amount of time work was available to claimant" or by basing average annual earnings on the claimant's earnings pattern during the years prior to the injury, "whichever will best render a fair and reasonable average annual earnings figure." 12 BRBS at 285-287.

Presently, the record contains thirteen years of Claimant's pre-injury earnings. There is insufficient evidence establishing Claimant would work steadily throughout the year. Consequently, I find the best approximation of Claimant's wage-earning capacity may be derived based on the average of Claimant's pre-injury earnings. Although the parties argue the undersigned should consider Claimant's earnings since 1996 or, alternatively, since 1998, neither party offers any explanation why Claimant's earning history should be truncated at either year to arrive at a fair and reasonable approximation of Claimant's earning capacity.

The record establishes the sporadic nature of Claimant's employment pre-dating his injury. Likewise, Claimant testified the industry may be "slow," when there is not much work available. There is no indication in the record Claimant recently received any substantial employment opportunities which enhanced his wage-earning capacity and would warrant a consideration of Claimant's most recent pre-injury earnings. Accordingly, I find all of the years in which Claimant was generally available to work the entire year are useful for a determination of his pre-injury weekly wage-earning capacity. I find Claimant was generally unavailable to work the entire years

of 1990 and 1997, when he was incarcerated for substantial portions of those years. Thus, earnings during those years are not helpful for a fair and reasonable approximation of Claimant's pre-injury wage-earning capacity. Accordingly, Claimant's earnings from 1987 through 1999, except in the years 1990 and 1997, are useful for a determination of his wage-earning capacity.

In light of the foregoing, Claimant's total annual income, based on the entirety of his pre-injury annual earnings except for earnings in 1990 and 1997, amounts to $69,106.73 ($1,134.75 + $6,567.75 + $3,870.93 + $8,405.55 + $9,683.91 + $6,320.25 + $7,736.04 + $8,024.76 + $2,859.62 + $9,760.77 + 4,742.35 = $69,106.68). (EX-20). Consequently, Claimant's average annual earnings during the eleven relevant periods of income amounts to $6,282.43 ($69,106.68 ÷ 11 = $6,282.43), or an average weekly wage of **$120.82** ($6,282.43 ÷ 52 = $120.82).

H. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette

Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

1. Reasonableness of Recommended Surgery

Claimant's treating physician, Dr. Ghadially, opined Claimant should undergo surgeries, including a lumbar fusion, to alleviate Claimant's symptoms stemming from his workplace injury. He opined Claimant's recommended surgeries are reasonable and necessary. Accordingly, Claimant has established a **prima facie** case under the Act showing that the proposed surgery is necessary and reasonable.

Employer/Carrier presented substantial evidence that Claimant's proposed medical treatment is neither reasonable nor necessary. Employer/Carrier's evaluating physician, Dr. Weiner, a Board-certified orthopedic surgeon, reported that Claimant is not a candidate for any type of surgery. Likewise, the opinion of Dr. Hanson, an independent medical examiner who is also a Board-certified orthopedic surgeon, concluded Claimant is not a candidate for any type of surgery. Accordingly, Employer/Carrier presented substantial evidence indicating Claimant's proposed surgical treatments are neither reasonable nor necessary.

Upon consideration of the entire medical record, I find the preponderance of probative evidence supports a conclusion that Claimant's surgery is reasonable and necessary, based on the well-reasoned opinion of Dr. Ghadially, Claimant's treating physician. It is noted that Drs. Weiner and Hanson are not board-certified in the recently created board-certification of spinal surgery, nor are they board-certified in pain-management, as is Dr. Ghadially. Further, neither Dr. Weiner nor Dr. Hanson have treated Claimant on an ongoing basis or treated him with greater frequency than Dr. Ghadially.

Moreover, I find the opinions of Dr. Ghadially are better-reasoned than the other physicians of record. See Brown v. National Steel & Shipbuilding Co., 34 BRBS 195, 201 n. 6 (2001) (an administrative law judge properly weighed the evidence by fully considering a treating physician's opinion and its underlying rationale as well as the other medical evidence of record rather than relying solely on a treating physician rule

as a basis for crediting a physician); Consolidation Coal Co. v. Director, OWCP, 54 F.3d 434, 438 (7th Cir. 1995) (disparaging a "mechanical determination" in administrative cases favoring a treating physician when the evidence is equally weighted).

Dr. Hanson's July 24, 2001 report noted Claimant's complaints of lower back pain and radicular left leg pain. Although Dr. Hanson briefly reported X-rays revealed "degenerative changes at L4-L5 with a posterior calcified herniation" and Claimant's MR [sic] scan revealed "severe degeneration from L3 to S1 with disc herniation centrally at L4-L5 and L5-S1," he failed to discuss in any detail the "very large" left paracentral "herniated and extruded disc" migrating through a "large and massively torn annulus" which impinged "upon the thecal sac and S1 nerve roots, more on the left," which was reported on Claimant's MRI. Likewise, he failed to significantly discuss other left-sided herniated discs in Claimant's lumbar spine, one of which reportedly impinged upon the thecal sac at L4-L5 on the MRI. Dr. Hanson also failed to discuss the stenosis reported on Claimant's MRI. At most, Dr. Hanson noted the results on the MRI were of "suboptimal" quality; however, he did not explain why the abnormalities reported in the MRI would be incorrect or otherwise revealed no nerve root impingement. Dr. Hanson also did not report upon the results of Claimant's discogram.

Based on his observations, Dr. Hanson did not immediately foreclose surgery as an option. Rather, he requested a myelogram and post-myelogram CT scan that were performed in October 2001 to "further delineate the pathology in Claimant's back," which would "dictate subsequent recommendations regarding treatment." Because he observed no evidence of nerve root compression after ostensibly reviewing the results of the myelogram and post-myelogram CT scan, Dr. Hanson simply concluded in his addendum report that Claimant had not reached maximum medical improvement and was not a candidate for "any type" of surgery without any further explanation. He did not discuss Claimant's discogram or MRI in his addendum report.

I find Dr. Hanson's failure to consider, explain or otherwise correlate the earlier reported abnormalities, notably on the left side of Claimant's spine with evidence of nerve root impingement, with the most recent myelogram and post-myelogram CT results diminishes the persuasiveness of his opinion. Consequently, I am not persuaded by Dr. Hanson's opinions to conclude Claimant is not a candidate for any type of surgery.

Likewise, I find Dr. Weiner's opinion that Claimant is not a surgical candidate is unpersuasive in establishing Claimant's proposed surgery is not reasonable or necessary. Dr. Weiner agreed with Dr. Hanson that Claimant was not a surgical candidate based on objective results which purportedly revealed no evidence of symptomatic abnormalities as well as Claimant's post-injury work history.

Although Dr. Weiner agreed with Dr. Hanson's report that Claimant's MRI was suboptimal, he failed to explain the extent of the deficiencies or why the abnormalities reported would be incorrect. Rather, Dr. Weiner relied on the MRI, which he noted indicated abnormalities in Claimant's spine. Unlike Dr. Hanson, Dr. Weiner discussed Claimant's discogram results; however, his deposition testimony focused on Claimant's subjective results of pain and his response to Marcaine injections. His July 23, 2001 report to Employer/Carrrier notes the post-discogram CT scan confirmed an abnormality.

Otherwise, Dr. Weiner did not discuss the evidence of nerve root impingement, thecal sac impingement, stenosis, herniated discs and a swollen root nerve reported in the post-discogram CT scan. Like Dr. Hanson, Dr. Weiner never discussed or explained the differences between Claimant's most recent October 2001 CT scan and the earlier objective results including nerve root impingement and stenosis seen on Claimant's post-discogram CT scan and MRI.

Moreover, as noted above, Dr. Weiner's reliance upon Claimant's post-injury work history is unpersuasive. Insofar as Dr. Weiner opined the majority of reasonable and prudent orthopedic surgeons would not recommend surgery for patients with spinal abnormalities at multiple levels, I find his opinion is unpersuasive. He offered no factual or authoritative support for his opinion. Further, Dr. Weiner's testimony is undermined by his April 4, 2001 opinion that Claimant might require a "simple one-level laminectomy with perhaps looking at another level" which he affirmed in his July 23, 2001 report that was generated after he reviewed the abnormalities at multiple levels on Claimant's discogram and post-discogram CT scan.

On the other hand, Dr. Ghadially specifically addressed the different results obtained on Claimant's earlier tests and those revealed in his more recent tests. His explanation that the procedural methods used to perform a discogram and post-discogram CT scan differ from those used for a myelogram and post-myelogram CT scan is reasonable and credible. His

testimony is persuasive and uncontroverted by any physician of record. Likewise, his opinion that an MRI, which is more sensitive to soft tissues, would confirm Claimant's spinal abnormalities is uncontroverted and persuasive.

Dr. Ghadially's opinion that Claimant's surgery is reasonable and necessary is buttressed by Claimant's medical records which indicate Claimant initially expressed reluctance to undergo a fusion, desiring instead to attempt to try working and living with pain. However, Claimant's complaints continued until he reported the pain was no longer bearable, and decided to undergo the operation despite the risks involved. I find Claimant is in a superior position to understand his symptoms of pain, and I find his testimony and medical history persuasive.

In light of the foregoing, I find Dr. Ghadially's opinion that surgery is necessary based on his treatment of Claimant and the objective results obtained, is most persuasive and well-reasoned in establishing Claimant's surgery is reasonable and necessary. I find Claimant has established by a preponderance of the probative evidence that his proposed surgery is reasonable and necessary for the treatment of his condition from his work-related injury. If Claimant elects to undergo surgical intervention, Employer/Carrier are responsible therefor under Section 7 of the Act.

2. Unpaid Medical Bills

Claimant avers Employer/Carrier should pay $1,095.00 in outstanding medical bills related to Dr.Ghadially's treatment of Claimant's compensable injury. Employer/Carrier argue "no specific unpaid medical bills were submitted by Claimant for reimbursement."

Contrary to Employer/Carrier's contention, Claimant presented Dr. Ghadially's account ledger which is sufficiently specific to allow an award of medical expenses. The ledger identifies the date of service, a brief description of the service, and the fee for each service. Employer/Carrier have not argued that the amounts identified in the ledger are not related to treatment for Claimant's compensable injury. Consequently, I find Employer/Carrier are liable for Dr. Ghadially's unpaid medical bills of $1,095.00 which are reasonable, necessary and related to the treatment of Claimant's compensable injury.

V. SECTION 14(e) PENALTY

In the present matter, Claimant argues in his brief that no penalties are due; however, he notes elsewhere in his brief that penalties are an unresolved issue. (Claimant's Brief, pp. 2, 36). Likewise, Employer/Carrier note penalties are at issue in their brief. (Employer/Carrier's Brief, p. 3). Otherwise, Employer/Carrier have not briefed the issue of penalties.

I find that there is substantial evidence in the record which indicates Section 14(e) penalties are applicable. See McKee v. D.E. Foster Co., 14 BRBS 513, 517 (1981)(an assessment under Section 14(e) of the Act is mandatory and may be raised at any time); Lauzon v. Strachan Shipping Co., 782 F.2d 1217, 1221, 18 BRBS 60, 65 (CRT) (5th Cir. 1985) (the assessment may not be waived by implied agreement); Gulley v. Ingalls Shipbuilding, Inc., 22 BRBS 262, 266 (1989), aff'd in pert. part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990) (an excuse from making payments or filing controversions must be "based on a showing that employer was prevented from making payments or filing notices because of circumstances beyond its control); Fairley v. Ingalls Shipbuilding, Inc., 22 BRBS 184, 192 (1989) aff'd in pert. part, Ingalls Shipbuilding v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990)(the Board vacated a deputy commissioner's decision to grant an employer's excuse for not timely filing a notice of controversion, because the excuse was not based on a showing that the employer was prevented from making payments or filing notices because of circumstances beyond its control); and Boudreaux v. J. Ray McDermott & Co., 13 BRBS 992.1 (1981), rev'd on other grounds, 679 F.2d 452, 14 BRBS 940 (5th Cir. 1982) (the Board raised the issue **sua sponte**).

Claimant was injured on October 25, 1999, and Employer was notified of the injury on the following day, October 26, 1999. Employer/Carrier tendered payment of compensation benefits on December 13, 1999. (EX-59, p. 1). Employer filed an LS-208 Notice of Final Payment or Suspension of Compensation Benefits on December 14, 1999. (EX-66). Employer/Carrier's LS-208 includes Claimant's name, Employer's name, the date of the alleged injury, and Employer's reason for the termination of Claimant's benefits, namely that he "returned to work." See White v. Rock Creek Ginger Ale Co., 17 BRBS 75, 78-79 (1984) (a notice of suspension filed within fourteen days of cessation of payments which provides the information required by Section 14(d) of the Act, including the reasons for suspension, is the "functional equivalent of a notice of controversion and

precludes application of the Section 14(e) ten percent assessment").

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d). The purposes of Section 14(e) are to encourage the prompt payment of benefits and to act as an incentive to induce employers to bear the burden of bringing any compensation disputes to the attention of the Department of Labor. Fairley, supra(citing Cox v. Army Times Publishing Co., 19 BRBS 195 , 198 (1987); Kocienda v. General Dynamics Corp., 21 BRBS 320 (1988)).

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[24] Thus, Employer, which was notified of Claimant's injury on October 26, 1999, was liable for Claimant's temporary total disability compensation payment on November 9, 1999. Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by November 23, 1999 to be timely and prevent the application of penalties.

I find Employer/Carrier's LS-208 filed on December 14, 1999 constitutes a valid notice of controversion for Employer/Carrier's decision to terminate Claimant's compensation benefits on December 14, 1999. Further, I find that the basis of Employer/Carrier's decision to terminate the benefits states the grounds upon which Employer/Carrier have relied to continue disputing Claimant's entitlement to benefits; however, I find and conclude that Employer did not voluntarily tender payment or file a notice of controversion timely by making a payment to Claimant on December 13, 1999 and filing the LS-208 on December 14, 1999. There is no evidence in the record Employer/Carrier was prevented from timely filing a notice of controversion or promptly paying benefits. Had Employer/Carrier paid Claimant

[24] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

prior to December 13, 1999, he arguably might not have felt compelled to immediately return to work beyond his restrictions.

In the present matter, Employer/Carrier are not liable for Claimant's disability through November 24, 1999, when Employer terminated Claimant, because Claimant sustained no loss in earning capacity, as discussed above. However, Employer/Carrier are liable for Section 14(e) penalties for any unpaid amounts from November 24, 1999 through December 14, 1999, when they filed the functional equivalent of a notice of controversion with the District Director.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District

Director to submit an application for attorney's fees.[25] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability for the following post-injury periods in which Claimant established no residual wage-earning capacity, based on Claimant's average weekly wage of $120.82, in accordance with the provisions of Sections 8(b) and 6(b)(2) of the Act and consistent with this Decision and Order: (a) November 24, 1999 to December 12, 1999; (b) December 20, 1999 through January 2, 2000; (c) January 17, 2000 to January 25, 2000; (d) February 5, 2000 to March 28, 2000; (e) April 12, 2000 to April 30, 2000; (f) May 26, 2000 to June 12, 2000; (g) July 6, 2000 to December 7, 2000; (h) December 13, 2000 to January 2, 2001; (i) January 16, 2001 to October 25, 2001; (j) November 12, 2001 to January 6, 2002; (k) February 4, 2002 to April 10, 2002; (l) April 26, 2002 to July 21, 2002; and (m) from October 11, 2002 to present and continuing. 33 U.S.C. § 908(b); 33 U.S.C. 6(b)(2).

2. Employer/Carrier shall pay Claimant compensation for

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[25] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **May 28, 2002**, the date this matter was referred from the District Director.

temporary partial disability from January 3, 2000 to January 16, 2000, based on two-thirds of the difference between Claimant's average weekly wage of $120.82 and his reduced weekly earning capacity of $93.50 in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

3. Employer/Carrier shall pay Claimant compensation for temporary partial disability from March 29, 2000 to April 11, 2000, based on two-thirds of the difference between Claimant's average weekly wage of $120.82 and his reduced weekly earning capacity of $91.40 in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

4. Employer/Carrier shall not be liable for Claimant's post-injury periods in which he established no loss in wage-earning capacity, namely: (a) October 25, 1999 through November 23, 1999; (b) December 13, 1999 through December 19, 1999; (c) January 26, 2000 to February 4, 2000; (d) May 1, 2000 to May 25, 2000; (e) June 13, 2000 to July 5, 2000; (f) December 8, 2000, to December 12, 2000; (g) January 3, 2001, to January 15, 2001; (h) October 26, 2001, to November 11, 2001; (i) January 7, 2002, to February 3, 2002; (j) April 11, 2002, to April 25, 2002; and (k) July 22, 2002, to October 10, 2002.

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's October 25, 1999, work injury, including recommended surgeries, pursuant to the provisions of Section 7 of the Act.

6. Employer/Carrier shall pay Dr. Ghadially's outstanding medical bills in the amount of $1,095.00.

7. If Claimant elects to undergo surgical intervention, Employer/Carrier are responsible therefor under Section 7 of the Act.

8. Employer shall be liable for an assessment under Section 14(e) of the Act to the extent that the installments found to be due and owing prior to December 14, 1999, as provided herein, exceed the sums which were actually paid to Claimant.

9. Employer shall receive credit for all compensation heretofore paid, as and when paid.

10. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

11. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported and verified fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 3d day of October, 2003, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge